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TITLE: LABOUR ARBITRATION PROCEDURES

Part I - Judicial Review of Labour Arbitration in Canada

Part II - Pilot Empirical Study of Labour Arbitration Hearings in Ontario

AUTHOR:

Professor Stanley Schiff,
Faculty of Law,
University of Toronto,
Toronto 5, Ontario.

DRAFT STUDY

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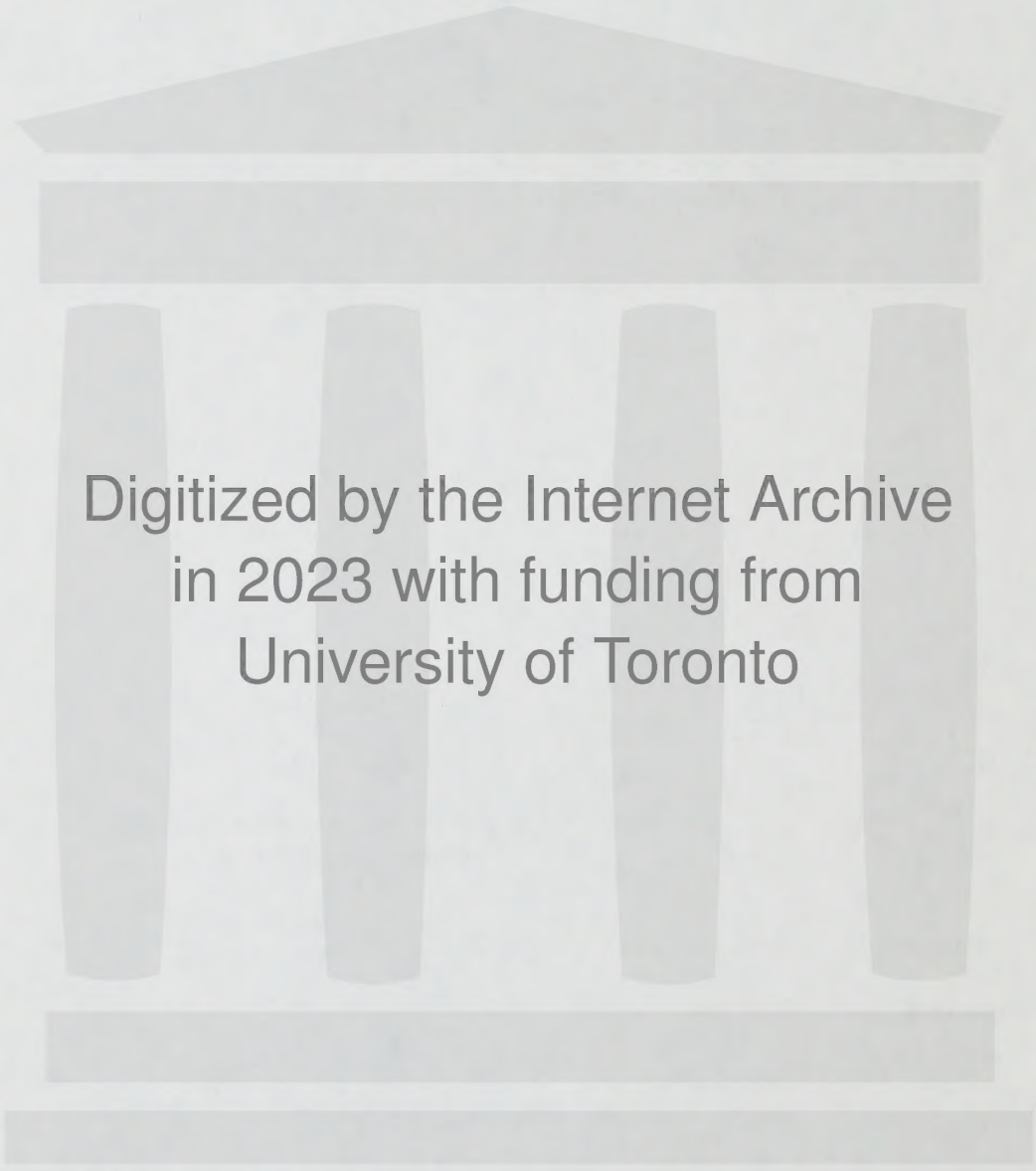

PART I

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PART ONE: THE LEGISLATIVE DIRECTIONS AND THEIR RATIONALE

The assurance of negotiation and strife-free administration of labour agreements between employers and organizations representing their employees is the core principle of modern labour relations legislation in North America. As legislative techniques to realize these ends, in 1944 the Wartime Labour Relations Regulations[1] inaugurated for the first time in tandem as national legislative policy in Canada three statutory requisites that together have become basic in labour relations thinking in this country. First, an employer and a trade union duly representing that employer's employees must bargain in good faith toward the negotiation of a collective agreement concerning the wages and working conditions of the employees. Second, during the currency of the collective agreement, there shall be no strikes nor lockouts of the employees covered by the agreement.[2] Third, those bound by the collective agreement shall settle all disputes arising from the agreement without stoppage of work by some alternative method set out in the agreement itself.[3]

As an alternative to economic warfare, arbitration is the most obvious and apposite method of contract dispute settlement. With the passing of the Industrial Relations and Disputes Investigation Act[4] in 1948, this method became firmly embedded in Canadian labour relations legislation. From the provincial statutes first passed in the late 1940's down to their present successor statutes, all provincial labour relations statutes (except that of Saskatchewan)

have followed the example of the Canada Act.[5] They prohibit strikes and lockouts during the currency of a collective agreement[6] and they require that the collective agreement shall contain a clause setting out a method to settle disputes arising from the agreement without stoppage of work.[7]

The Canada Act and the labour relations statutes of Manitoba, New Brunswick, Newfoundland, Nova Scotia and Prince Edward Island (all of which are closely modelled after the Canada Act) all require settlement of contract disputes "by arbitration or otherwise". The labour relations statutes of Alberta and British Columbia require settlement "by arbitration or such other method as may be agreed" to by the parties. The statutes of Ontario and Quebec require settlement solely by arbitration.

Despite the fact that the statutes of Alberta, British Columbia and Newfoundland permit the parties to negotiate a method of contract dispute settlement other than arbitration, nevertheless these statutes (as well as the statute of Ontario) emphasize the primacy of arbitration as the appropriate method by providing that "any question as to whether a matter is arbitrable" is included among the disputed matters which must be settled by the negotiated method. In addition, if the parties fail to include in the collective agreement a clause setting out dispute settlement machinery which conforms with the statutory requisites, the statutes of Alberta,

Manitoba, Newfoundland and Ontario (only the last of which permits no alternative to an arbitration clause) set out a model arbitration clause which is then deemed to be part of their agreement. Finally, to underline the legislature's direction concerning the authority of the labour arbitrator vis-a-vis the courts of general jurisdiction in determining disputes arising from collective agreements, the labour relations statutes of Manitoba and Ontario specifically exclude the application to collective agreement arbitration of the respective provincial Arbitration Acts.[8]

It is possible for parties subject to the Canada Act or any provincial labour relations statute except that of Ontario or Quebec, to embody in their collective agreement a clause providing for settlement of contract disputes which does not contemplate arbitration. However, I have never heard of any such alternative provision nor can I conceive of its nature. When one considers the possible alternatives to economic warfare, adjudication by arbitrators is the only method that appears to accommodate speed, flexibility of procedure, rationality, and moral force conducing the parties to acceptance of the determination. Canadian statistics are lacking but, if we may rely analogically upon the almost universal voluntary inclusion of arbitration clauses in collective agreements in the United States,[9] we may infer that all but a very small number of collective agreements

negotiated in Canada contain (expressly or by statutory implication) a clause providing for final settlement of disputes by arbitration.

The analysis set out above assumes that the legislative directions in Canada are specifically designed to substitute arbitration for industrial strife as the means to enforce collective agreements; the analysis deliberately ignores a possible alternative argument that labour arbitration like commercial arbitration is really a substitute for court litigation[10]. Whatever may have been the strength of this alternative argument in the United States prior to the Steelworker Trilogy[11], it could not authoritatively have been pressed in the Canadian context prior to the inauguration of current labour relations legislation. Until that time, with the exception of the contrary opinion of the Court of Appeal for British Columbia in 1939[12], Canadian courts and the Judicial Committee were of the view that at common law parties could not enforce a collective agreement by lawsuit but were rather obliged to use economic force[13]. Not until after the various labour relations statutes (which included prohibitions against strikes and lockouts and required arbitration clauses in all collective agreements) were passed in the 1940's did Canadian courts generally agree that collective agreements might be enforced by lawsuit[14].

We need not debate the legal nature of a collective

agreement[15] to recognize the strong reasons underlying the statutory directions that parties arbitrate their disputes arising from them--the desirability of successful negotiation of collective agreements in the first instance and their due administration without stoppage of work thereafter. However, even if we concede that collective agreements are common law contracts in many respects, these reasons dictate differences between collective agreements and the run of commercial contracts, and differences between the appropriate methods of handling disputes arising under them. And these differences in turn are central to a critical evaluation of judicial review of labour arbitration.

When we examine the rationale that the parties should in the first instance successfully negotiate a collective agreement, the following differences become evident[16]. The employer and the trade union negotiate against the backdrop of a previous relationship, often between the employer and the union itself, but always between the employer and its own employees. The employer and the representative of its organized employees must as a matter of fact ultimately agree to some set of terms, whether wise and intelligibly articulated, or the opposite; unlike negotiators in the commercial marketplace, they cannot simply part forever when negotiations break down. With these facts and the threat of economic strife ever-present, in order to facilitate mutual assent to the written terms of the document, the parties are

often impelled to "paper over" with verbal unclarity or to remain silent concerning certain matters about which they actually or potentially may disagree. The document as finally executed must serve as the basis to regulate working conditions of many tens, hundred, or even thousands of employees in numerous different jobs over extended periods of time into a future where the nature of myriad possible problems cannot be foreseen.

Examining now the rationale that the parties should duly administer the collective agreement without work stoppage, we may see the following differences. This rationale itself diverges sharply from that invoked in litigation: there the courts seldom direct attention to the problems of maintaining a working relationship between the parties to a commercial contract; since the relationship has already broken down, the courts' main concern is with monetary compensation. Due administration of collective agreements requires procedures for the adjustment of in-plant disputes which terminate in some reasonably fast and mutually acceptable technique of final settlement. Due administration requires a technique of final settlement which takes informed account of the requisite adjustment of employer and employee claims and of the factors set out above which differentiate collective agreements from commercial contracts. Finally, due administration requires final settlement by arbiters in whom the parties may repose a maximum of trust due to their personal

choice of the arbiters and to their respect for the arbiters' informed determination.

The explicit legislative directions of twenty years' standing in Canada and the analyses of their underlying reasons should govern the procedures and standards of judicial review of labour arbitration. They should form the basis for definition of the appropriate scope of arbitral freedom from judicial interference. At the same time, in order that labour arbitration shall be properly integrated into the general system of state-authorized adjudicatory tribunals, the definition must account for the historically-grounded expertise and particular authority of the courts of general jurisdiction in setting broad standards of procedural fairness, in determining the bounds of rational decision, and in establishing the meaning of general legislation of the state. However, with the exception of a few judges, Canadian courts have not recognized the significance of the legislative directions and have not explored the nature of their task upon review.

This Report will outline the procedures by which labour arbitrations are reviewed before Canadian courts and the standards of review which they have imposed. The Report will comment on the procedures and standards in the light of the reasons for arbitration of collective agreement disputes. A brief reference will then be made to federal labour relations legislation in the United States and to doctrine of judicial

review there. Finally, the Report will suggest changes in court practice and statutory amendment better to accommodate the functions of labour arbitrators and reviewing courts.

PART TWO: PROCEDURES AND DOCTRINE OF REVIEW

A. PROCEDURES TO OBTAIN JUDICIAL REVIEW

To the present, with one notable exception[17], Canadian judges called upon to review labour arbitrations have assumed that the matters which they might review are defined by the elements of the available procedure for review invoked by the applicant. While I am of the opinion that this assumption is not necessarily correct, in this Report I will nevertheless examine procedures for review, and timing and scope of review, and will relate procedures to timing and scope.

1. PROVINCIAL ARBITRATION ACTS

Except where the respective provincial labour relations statute specifically excludes application of the provincial Arbitration Act from labour arbitrations (Alberta, Manitoba, Ontario), Arbitration Acts[18] have regularly been invoked to review the conduct of hearings and the awards of arbitrators subject to the respective provincial labour relations statutes[19].

Until 1965, through a series of applications in the courts of British Columbia, it was assumed that the conduct of the hearing and the award of arbitrators subject to the Canada Act might be properly reviewed pursuant to the provincial Arbitration Act, and the rules of courts applicable

thereto[20]. However, in Re Etmanski and Taggart Service Ltd.[21] (1965), the Court of Appeal for Ontario, in a weakly-reasoned judgment which applied constitutional doctrine, held that a provincial Arbitration Act could not be invoked in aid of grievance arbitration under the Canada Act. Subsequently, the Ontario High Court[22] and the Manitoba Queen's Bench[23] have followed the necessary implications of Etmanski to deny the use of the provincial Arbitration Acts to review arbitrations subject to the Canada Act.

2. CERTIORARI

The Court of Appeal for Ontario has held that, since the Ontario Labour Relations Act requires arbitration as the sole method of contract dispute settlement, arbitrators subject to the Act are statutory tribunals whose awards may be attacked by way of motion for certiorari: Re International Nickel Company of Canada Ltd. and Rivando[24] (1956). The Quebec Superior Court has followed suit in respect to an arbitrator under the Quebec Labour Code: Commission des Ecoles Catholiques de Shawinigan v. Roy et al.[25] (1966). The latter opinion is contrary to the analysis under the former Labour Relations Act of Quebec where the Quebec Superior Court had denied that arbitration of a collective agreement dispute was subject to attack by certiorari: Canadian British Aluminium Co. Ltd. v. Dufresne et al.[26] (1964). Arbitrators who are subject to statutes which formally permit dispute settlement by a method other than arbitration (Canada, Alberta, British

Columbia, Manitoba, New Brunswick, Newfoundland, Nova Scotia, and Prince Edward Island) may not be attacked by certiorari[27].

3. INHERENT JURISDICTION OF THE COURT TO REVIEW ARBITRATION AWARDS

To date, except for the obiter dictum of the Supreme Court of Canada in Howe Sound Company v. International Union of Mine, Mill and Smelter Workers (Canada), Local 663[28] (1962), the invocation of judicial power to review arbitration awards apart from provedures set out in the various Arbitration Acts has been specifically canvassed in only one case: Re Hudson Bay Mining and Smelting Co. Ltd. and Flin Flon Base Metal Workers' Federal Union, No. 172 et al.[29] (1966). Two procedures are suggested by the Manitoba Queen's Bench in the Hudson Bay Mining case:

(i) originating notice of motion under rules of court, e.g., referable to the interpretation of documents; and

(ii) formal lawsuit commenced by writ where the plaintiff seeks a declaratory order.

In the Hudson Bay Mining case itself, the first procedure was invoked[30] and was approved on appeal by the Court of Appeal for Manitoba[31]. In Canadian Air Line Pilots Association et al. v. Canadian Pacific Airlines et al.[32] (1965), the plaintiff union sued for damages for breach of the collective agreement, for a declaration concerning the dispute which had been determined by arbitrators appointed under the collective agreement, and for an order setting aside their award. In dismissing the action on the merits, neither the trial judge nor the Court of Appeal for

British Columbia discussed the procedure invoked by the plaintiff for attacking the award.

B. TIMING OF JUDICIAL REVIEW

Despite other available possibilities, the usual practice manifested in the reported cases is for the complainant party to await issuance of the award before moving. When the party proceeds under the relevant Arbitration Act (available for arbitrations subject to all labour relations statutes, except the Canada Act and those of Alberta, Manitoba and Ontario), he moves the court to "set the award aside" and perhaps also to "remit the matters referred...to the reconsideration of the arbitrators"[33]. A similar procedure to set aside a labour arbitration award but not to remit is now available under the Alberta Labour Act[34]. When the party invokes the inherent jurisdiction of the court by motion under rules of court similar to the rules in Hudson Bay Mining, the court has power to "pronounce such judgment or make such order as the nature of the case may require"[35]. On appeal in that case, the Court of Appeal for Manitoba specifically approved invocation of the rules of court and assumed by their disposition of the appeal that they had power to quash the award. When the party proceeds by motion for certiorari, he moves the court to quash the award. The Court of Appeal for Ontario has held that upon the motion the court has inherent power to remit the matter to the same or another arbitrator[36].

Less commonly, a party to a grievance arbitration may attempt to secure court review before the hearing is concluded.

When he proceeds under an available Arbitration Act, he may move for the opinion of the court on any point of law arising at any time in the course of the arbitration[37]. A similar procedure is now specifically available for labour arbitrations under the Alberta Labour Act[38]. A complaining party who might move for certiorari after final award issued may move earlier against any separate award limited to disposition of a preliminary objection[39]. Although there are no reported cases on the point, unless some doctrine of prematurity were applied, the same party might also move for prohibition during the course of the hearing on the ground of some manifest error.

C. SCOPE OF JUDICIAL REVIEW

Whether the applicant has proceeded under the relevant Arbitration Act or by way of certiorari or has invoked the inherent jurisdiction of the court, the judges on review have examined a similar range of matters associated with the hearing and the award and have purported to apply similar tests of arbitral propriety. These matters are: formal constitution of the arbitration tribunal pursuant to statute and collective agreement, arbitrability of the issues, due process in the hearing (including notice of hearing, opportunity to be represented, and lack of bias in the tribunal), rules of evidence, substantive rules and standards of decision applied by arbitrators, interpretation by arbitrators of statute law, remedial power of arbitrators, unanimity and finality of the award. However, in respect to

review of arbitrators' determination of the merits of the referred dispute, a distinction has been drawn between those awards which have been held reviewable by way of certiorari and those awards which have been held not so reviewable.

1. FORMAL CONSTITUTION OF THE ARBITRATION TRIBUNAL PURSUANT TO STATUTE AND COLLECTIVE AGREEMENT

Where grievance and arbitration clauses of the collective agreement set out peremptory time limits for the appointment of arbitrators, failure of the parties to appoint them within the stated times has been held to deny jurisdiction to the arbitrators to enter upon enquiry into the grievance: Regina v. Weiler et al.; ex parte Hoar Transport Co. Ltd.[40] (1968). The judge of first instance in Hoar Transport had held that the arbitrators' preliminary determination that they had jurisdiction did not on the facts of the particular case cause any "substantial wrong or miscarriage of justice" to the employer within the curative section of the Ontario Labour Relations Act[41]. The Court of Appeal for Ontario disagreed: the court translated the arbitrators' determination into an attempt by an inferior statutory tribunal to give themselves jurisdiction by altering a substantive provision of the collective agreement, and they held that this constituted a miscarriage of justice. Assuming that the delay in time had not factually prejudiced the employer, the decision by the Court of Appeal for Ontario on the curative effect of the section in abstract terms of

"jurisdiction" can only reduce the requisite flexibility of labour arbitration.

While no labour relations statute in Canada requires any oath for an arbitrator, the New Brunswick Appellate Division has held that, since arbitrators subject to the New Brunswick Labour Relations Act are also subject to the New Brunswick Arbitration Act, the oath for arbitrators required by the Arbitration Act is a condition precedent to their jurisdiction: Re Atlantic Sugar Refineries Ltd., and Bakery and Confectionary Workers International Union of America, Local 443[42] (1960. Here again, the court's insistence upon formal prerequisites in the absence of any showing of prejudice to either party weakens labour arbitration as a flexible means of contract dispute settlement.

2. ARBITRABILITY OF THE SUBMITTED ISSUES

Until the decisions of the Supreme Court of the United States in United Steelworkers of America v. American Manufacturing Co.[43] (1960) and United Steelworkers of America v. Warrior & Gulf Navigation Co.[44] (1960), courts were often called upon to intervene prior to the arbitration hearing where one of the parties denied arbitrability of the disputed matter under the collective agreement[45]. In contrast, in Canada, even though only the statutes of four jurisdictions (Alberta, British Columbia, Newfoundland and Ontario) specifically provide for the determination by the arbitrator of arbitrability, there have been few reported judicial challenges to arbitrators on the ground of non-arbitrability

prior to the issuance of their awards on the substantive issues.

In Local 443 of the Bakery & Confectionary Workers International Union of America v. Atlantic Sugar Refineries Ltd.[46] (1960), the collective agreement specifically excluded from arbitration "disagreements concerning those functions which are the rights of management as set forth in Article 4". This latter Article then provided that "all functions that have not been specifically restricted by the clauses of this agreement are the right of management". In addition, the governing New Brunswick Labour Relations Act does not in terms empower the arbitrator to determine arbitrability. During the arbitration of a union grievance against the employer's contracting out certain work, the employer applied to the New Brunswick Appellate Division to order the arbitrators to state a case regarding whether the present dispute was subject to arbitration under the agreement. In rejecting the application, the court held that the question requested by the employer was identical to that before the arbitrators and that court action would abort the arbitration proceedings.

In Howe Sound Company v. International Union of Mine, Mill and Smelter Workers (Canada), Local 663[47] (1962), the employer had attacked by way of motion for certiorari the arbitrators' preliminary determination that the matter in dispute was arbitrable. The Supreme Court of Canada, affirming the decision of the Court of Appeal for British Columbia[48] that

the procedure was not available against arbitrators subject to the Labour Relations Act of British Columbia, did not review the arbitrators' determination of arbitrability. In obiter dictum, the Supreme Court remarked that the judge of first instance (who had dismissed the motion on its merits after stating the arbitrators' determination of arbitrability was the result of the only possible interpretation of the collective agreement) should not have addressed himself to that question: "his function was to determine whether or not the board had jurisdiction to decide it"[48]. Since the British Columbia Act did not then provide that arbitrators might also determine arbitrability, these words may hint that, even under such a statute, the arbitrators' determination of arbitrability may exclude judicial review.

The one other reported example of prior judicial review is Regina v. Weiler et al., ex parte Union Carbide Canada Ltd.[50] (1967), involving an arbitration subject to the Ontario Labour Relations Act which specifically empowers the arbitrator to determine arbitrability. Although the arbitration award itself[51] is not clear whether the parties had specifically referred the question of arbitrability to the arbitrators, the Court of Appeal for Ontario appeared to base its denial of prohibition and certiorari in part upon a finding that the parties had specifically referred this question to the arbitrators, and in part upon a holding that arbitrators' determination of arbitrability under the

Ontario Labour Relations Act is not judicially reviewable[52].

The holding of the Court of Appeal in Union Carbide that the specific statutory grant of authority to the arbitrator to determine arbitrability excludes judicial review of his determination is precisely the opposite position to that set out in the Alberta Labour Act[53]. While the arbitrator is empowered to determine arbitrability, the statute provides for judicial review of his determination.

3. DUE PROCESS IN THE HEARING

(a) Notice of Hearing and Opportunity to be Represented

It has been rare for arbitration awards to be attacked because the arbitrator has denied to a party the right to be heard. However, in Westeel Products Ltd. v. United Steelworkers of America, Local 3229[54] (1964), the British Columbia Supreme Court set aside an award on the ground that the arbitrator had conducted the hearing on the merits in the absence of counsel to the employer who was unable to attend and had previously requested an adjournment.

Very recently, the Court of Appeal for Ontario and the Supreme Court of Canada have extended the right to be heard to certain employees within the bargaining unit represented by the party union. Where the position before the arbitrator of the party union on the grievance is in substance contrary to the employment interest of specific employees in the unit, the employees must be given prior notice of the grievance, of their

right to be represented and to make representations at the hearing. For failure of the parties to give due notice, an award inimical to the employees affected will be quashed: Regina v. Ottawa Professional Fire Fighters Association et al., ex parte Bradley et al.[55] (1967); Re Hoogendoorn and Greening Metal Products & Screening Equipment Co.[56] (1967).

In Bradley and Hoogendoorn, the courts insisted that employees should receive due protection when the claims of the bargaining agent at the arbitration hearing are clearly contrary to their employment interests. Some arbitrators have informally criticized the two cases by arguing that they weaken the union's statutory position vis-a-vis the employees in the unit as their exclusive bargaining agent and require separate representation for an unpredictable number of these employees every time the union raises an issue adversely effecting them. In my opinion, these arguments may be easily answered.

First of all, it is inconceivable that there are many grievances or possible kinds of grievances where the union will be obliged deliberately to favour the interests of one employee or set of employees over those of another. Therefore, even if the position of a particular union as bargaining agent is somewhat weakened through the occasional application of the Bradley-Hoogendoorn rule, the value of according a measure of independent justice to affected employees outweighs injury to the union. Secondly, each arbitrator must

decide on the facts of the dispute before him, whether the union's position is substantially directed against the interests of specific unrepresented employees and, if so, how these interests might adequately be represented. At the hearings where the union presents what is truly a policy grievance, the reasoning of the Court of Appeal for Ontario in Hoogendoorn[57] will apply and representation for employees separate from that of the union will not be warranted. On the occasions where separate representation may be necessary for numbers of employees, it seems that a due accommodation of their interests with arbitral efficiency might be achieved consistent with the Bradley-Hoogendoorn rule if the arbitrators limited separate representation for the employees to a single spokesman for all employees affected in a substantially similar manner by the party union's adverse position.

(b) Partiality of the Arbitrators

From the personal experience of those engaged in labour arbitrations and from the confirmatory result of the Pilot Empirical Study of Labour Arbitrations in Ontario[58], there is little doubt that unions and employers alike commonly understand that both sides to labour arbitrations inevitably choose their respective board nominee precisely because of his particular prior labour relations bias and with the expectation that his bias will shape his evaluation of testimony, argument, and collective agreement. The two

Canadian courts which to date have dealt with allegations of improper bias in nominees to labour arbitration boards have sanctioned these reasons for choice and these expectations.

In Canadian Air Line Pilots Association et al. v. Canadian Pacific Air Lines Ltd. et al.[59] (1965), the plaintiffs attacked the award on the ground of bias in the employer's nominees who had been appointed to the arbitration board under the terms of the collective agreement. In dismissing the action, the judge at first instance and the Court of Appeal for British Columbia agreed that, where the collective agreement provided for the persons to be appointed and the parties must therefore have contemplated that the nominees would have preconceived views, the conduct of nominees cannot be impugned without proof that they had wholly made up their minds in advance of the hearing or had acted in collusion with their nominator in determining the issues.

The decision in Re Gainers Ltd. and Local 319, United Packinghouse Workers of America[60] (1964) demonstrates how strongly at least one judge of the Alberta Supreme Court emphasizes the parties' expectations that nominees to labour arbitration boards will be partisans. The union challenged the company nominee in mid-arbitration on the ground of bias because he was the son and law partner of the lawyer who was general company solicitor and company counsel before that very board of arbitration. After a broad canvass of published

authority on the practice concerning appointment of nominees[61], the judge held that the parties understood and expected that nominees on the arbitration board would be partisan, and that the company nominee on this board merely complied with the understanding. One might question seriously whether this decision does not carry application of the common understanding beyond its legitimate scope: could this particular nominee really have avoided influences which would have all but closed his mind to the merits?

The parties' expectations and the courts' restraints are different regarding the chairman of a board of arbitration. So far as he is concerned, both experience and the result of the Pilot Empirical Study[62] show that the parties usually expect him to maintain a strictly neutral, judicial posture. In the two Canadian cases where a labour arbitration award has been attacked on the ground of the chairman's bias arising from facts allegedly unknown to the complaining party before the hearing, the courts have enunciated standards confirming this expectation.

In Re Arbitration between International Union of Operating Engineers, Local 115, and Saguenay-Kitimat Co.[63] (1956) and in Regina v. Board of Arbitration; ex parte Cumberland Railway Co.[64] (1968), the respective courts applied to the chairman of a labour arbitration board the standard enunciated by the Supreme Court of Canada in Szilard v.

Szasz[65] (1955): "It is the probability or the reasoned suspicion of biased appraisal and judgment, unintended though it be, that defeats the adjudication at its threshold." In Saguenay-Kitimat Co., the British Columbia Supreme Court held that the chairman's performance as a solicitor of certain small services for the employer before his appointment as chairman and again after the award was issued did not raise any "probability or reasoned suspicion of biased appraisal or judgment", and thus did not warrant disqualification. In Cumberland Railway Co., unknown to the employer, the chairman of the arbitration board had previously served as chairman of a board of referees upon the present grievor's claim for workmen's compensation, and had in that proceeding decided the present issue of just cause for dismissal in the grievor's favour. After quoting at length from Szilard v. Szasz, the Nova Scotia Appellate Division disqualified the chairman for bias and quashed the award.

(c) Ex Parte Consultations

Neither the chairman nor the nominees on the board may entertain evidence on the issues in the absence of the parties. In Reference re Building Material, Construction & Fuel Truck Drivers' Union, Local 213, etc. and United Cartage Co. Ltd.[66] (1956), the British Columbia Supreme Court set aside and refused to remit to the same arbitrators an award where the chairman of an arbitration board had privately

interviewed a witness and had inspected documents in the witness's possession, and nominees had privately talked to the same witness over the telephone.

However, the Manitoba Court of Queen's Bench has determined obiter dictum that, in the same limited circumstances as in commercial arbitration, labour arbitrators may seek outside legal advice without the parties' prior consent, viz., in drawing the award, in the conduct of the hearing, and concerning the general principles of law governing that class of case: Nabess and Lynn Lake Base Metal Workers' Federal Union, No. 292 v. Sherritt Gordon Mines Ltd.[67] (1959).

4. REVIEW OF ARBITRATORS' DETERMINATION OF THE MERITS OF THE GRIEVANCE

While lower courts in the various provinces have elaborated detailed doctrine concerning judicial review of arbitrators determinations on the merits, few cases have reached the Supreme Court of Canada. As a result, the Supreme Court has rarely spoken on the matter and, when speaking, the court has not taken the opportunity to comment at length on the doctrine. Statements which the court has made will be considered below and may hint at a conception of judicial review perhaps more subtle than that invoked by lower courts.

In defining the scope of judicial review of arbitrators' determination of the merits, provincial courts have drawn distinctions between two classes of arbitration--those

arbitrations subject to labour relations statutes which formally permit an agreed method of dispute settlement other than arbitration (viz., the Canada Act and the statutes of all provinces except Ontario and Quebec) and those arbitrations subject to a labour relations statute which requires final settlement solely by arbitration (viz., the Labour Relations Act of Ontario and the Labour Code of Quebec). As outlined above, the sanctioned procedures for attack against these two classes are different. In the case of the former class, the complaining party moves under the applicable Arbitration Act or, if it is not available, by summary motion to invoke the inherent jurisdiction of the court to review arbitration awards. In the case of the latter class, the complaining party moves by way of summary motion for an order in lieu of certiorari[68]. It is the historic differences between the scope of judicial review of commercial arbitrations, on the one hand, and of inferior statutory tribunals, on the other, which now verbally define the distinctions of scope of judicial review between the two classes of labour arbitrations.

(a) Review under Arbitration Acts or the Inherent Jurisdiction of the Court to Review Arbitration Awards

When review of labour arbitration awards has been sanctioned under the procedures of provincial Arbitration Acts or by invocation of the court's inherent jurisdiction, Canadian courts have applied substantive doctrine applicable to

judicial review of arbitration of disputes in commercial matters which occur pursuant to special or general contract. This doctrine may be briefly synopsized as follows[69]: The reviewing court has exclusive power to define the exact issues of law or fact which the parties have specifically agreed in their contract to submit to the arbitrator for his determination. Where the parties have agreed to submit to him the whole dispute between them without separating out specific issues of law or fact, no part of their agreed submission (except presumably the narrow request for determination) is deemed to be the reference of specific issues. The court has full power to set aside the arbitrator's award on the ground of any error of law which he commits in the course of his determination of the specific issues referred to him, which error is outside the scope of these specific issues and which is manifest on the face of the award. However, within the scope of the exact issues specifically referred to the arbitrator, the court will not interfere with his determination even if the court is of the opinion that the arbitrator has erred. In the context of this doctrine, the term "law" includes court rules of evidence and of documentary interpretation as well as the arbitrator's interpretation of the relevant document itself.

The reasons underlying this doctrine appear to be the following[70]. First of all, private parties in dispute

are free to agree in the first instance to submit specific issues to an adjudicator of their own choice rather than to a court of general jurisdiction, and thereafter to have those issues determined solely by that adjudicator. The protected value here is that of unfettered individual freedom of contract. Secondly, the same private parties are free (indeed have the right) to have those issues--and no others--determined by the chosen adjudicator and to have any other issues determined by the courts of general jurisdiction. The protected values here are the same freedom of contract and also unfettered individual freedom to invoke adjudication by the courts of general jurisdiction. Thirdly, the courts of the state are duty-bound to protect their own adjudicative authority over disputes arising in the state.

Analytically these reasons do not apply to arbitration of disputes arising under collective agreements in Canada. First, the parties to collective agreements are not free at any time to agree to choose arbitration rather than litigation. As a matter of fact, the choice for the parties is between arbitration and industrial strife and, as a matter of legislative direction, the parties are compelled to choose arbitration rather than strife.

Secondly, Canadian courts have not historically adjudicated disputes arising from collective agreements, and the legislative directions indicate strongly the policy that they should now be excluded from this adjudication.

Thirdly, the breadth of the statutory statements concerning the matters which factually must be settled by arbitration largely foreclose application of the ordinary rule permitting judicial review of all "errors" outside the scope of issues which the parties have specifically referred to the arbitrators' determination[71]. Indeed, should the parties to a collective agreement include an arbitration clause which provides for arbitration within a narrower scope, the labour relations statutes of Alberta, Manitoba, Newfoundland, and Ontario contain a model clause of wide scope which must be read into the collective agreement[72], and the Canada Act and the labour relations statutes of British Columbia, New Brunswick, Nova Scotia and Prince Edward Island set out procedures to have an arbitration clause of appropriate breadth added to the agreement[73].

Fourthly, unlike commercial arbitration where the parties may tailor a neat statement of the disputed matter for submission to the arbitrator, written grievances under collective agreements commonly state the complaint in broad and imprecise language--often without focussing upon any specific clauses of the collective agreement and sometimes without even setting out the relief desired. Under the doctrine of judicial review born of commercial arbitration, such reference of the whole dispute without definition of specific issues permits judicial review of the arbitrator's total determination, except presumably his final statement

of who is right and who is wrong[74]. But clearly, such judicial pressure to precise advance definition of issues would be detrimental to in-plant administration of the collective agreement and to grievance arbitration, and would yield little compensatory advantage. As corroborated by the Pilot Empirical Study[75], the legitimacy of imprecision takes account of the limited skill of the grievor (or his union representative) in drafting the complaint; it avoids the taint of excessive formality in the grievance and arbitration process; it obviates the danger of prejudice to a party by unduly forcing him into a premature statement of his exact legal position in the dispute; and, upon the arbitration, the legal and factual issues usually emerge to the arbitrators' understanding with sufficient clarity at some time before the end of the hearing.

Some courts have recognized the fact that parties to labour arbitration are commonly imprecise in defining the issues, but this recognition has not resulted in any judicial protection for the advantages to grievance arbitration associated with imprecision. In one case, the Newfoundland Supreme Court attempted to force the parties into the mould of commercial arbitration by instructing the arbitrators to insist on a precise written statement of the issues: Daley v. Royale Excavating Co. Ltd. et al.[76] (1961). The Court of Appeal for Ontario has attempted to discern the precise issues from the written grievance, the reply, the award, and all facts relevant to the claim: Regina v. Fuller et al.; ex parte Earles

and McKee[77] (1967); Regina v. Barber et al.; ex parte Warehousemen and Miscellaneous Drivers' Union, Local 419[78] (1968).

Canadian courts usually apply the rule drawn from review of commercial arbitrations, define "the very issues" submitted to the arbitrators, and set aside awards when the arbitrators have committed manifest "errors of law" in determining "collateral" issues. It is the way courts may exercise the power to define the submitted issues that causes much of the difficulty: exactly because the grievance document and the reply may not (and usually do not) define clearly precise questions of law or fact, courts may exercise the power to define the submitted issues in such a way as to widen or narrow the proper scope of judicial review and conversely to narrow or widen the arbitrators' freedom from review.

Courts have often taken a narrow view of the issues submitted to the arbitrators and have thereby assumed power to set aside awards for errors outside the defined narrow ambit. Examples follow.

(1) Union grieved that employer had violated collective agreement by suspending employees from work. In upholding the grievance, arbitrators determined that employer had violated the collective agreement when it had insisted upon employees working under certain factual conditions; that the union had therefore been entitled to assume that the employer thought itself no longer bound by the collective

agreement; that the union was thereupon discharged from obligations under the collective agreement; and that the employer was therefore not justified in suspending the employees. On motion for judicial review, the British Columbia Supreme Court held that all the arbitrators' determinations except the last were collateral to the very issue submitted to them and could be review for error: Shipping Federation of British Columbia and International Longshoremen's and Warehousemen's Union, Local 501[79] (1960).

(2) Union grieved that certain employees were wrongly dismissed. In dismissing the grievance, arbitrators held that a certain term in the collective agreement specifically permitted the employer to dismiss the employees on notice without any cause. On motion for judicial review, the British Columbia Supreme Court held that the interpretation of the particular contract terms was a collateral legal issue and therefore subject to review: Re Columbia Packing Co. Ltd. and Amalgamated Meat Cutters and Butcher Workmen of North America, Local 212[80] (1961).

(3) Union grieved that certain employees were discharged without proper cause. In upholding the grievance, arbitrators stated that they might dispose of the discharge grievance by any arrangement which in their opinion was just and fair. On appeal from judicial review by the British Columbia Supreme Court, the Court of Appeal for British Columbia held that the meaning of "proper cause" in the

collective agreement was a collateral legal issue reviewable by the court: International Woodworkers of America, Local 1-423 v. S. & K. Ltd.[81] (1961).

(4) Employee grieved that employer had wrongfully refused to pay him wages while he was absent through illness. In allowing the grievance, arbitrators determined that, in the presence of a term in the collective agreement creating a sick benefit plan and in the absence of any term denying wages to employees during absence due to illness, the employer was obliged to make the payment. On motion for judicial review, the British Columbia Supreme Court held that interpretation of the collective agreement was a collateral legal issue reviewable by the court: Re Albert Wheat Pool and Local 333 of the International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America[82] (1962).

(5) Union grieved that employer had hired a person outside the bargaining unit to perform on a Sunday work covered by the agreement and that, had the employer duly assigned the work to employees within the bargaining unit, the employees should have been paid overtime. In allowing the grievance, arbitrators determined that the work was ordinarily performed by employees within the unit; that, since employees within the unit had already worked more than the normal work week, performance of the assigned work on the Sunday would have constituted overtime; and that the employer could only assign such work to persons outside the bargaining

unit after he had assigned work to all available employees within the unit. Upon motion for judicial review, the Ontario High Court held that the question of overtime and the question of assignment of work to persons outside the bargaining unit had not been submitted to the arbitrators and were reviewable: Re Texaco Canada Ltd., and Oil, Chemical and Atomic Workers' International Union, Local 16-599[83] (1964).

(6) Union grieved that employees were discharged without proper cause. In dismissing the grievance, arbitrators held that the grievors had refused to work and that this conduct warranted their discharge. Upon motion for judicial review, the British Columbia Supreme Court stated obiter dictum that, if the arbitrators had held that a refusal to give a commitment to work was proper cause for discharge, such a holding might have been error of law on a collateral question: Industrial Woodworkers of America, Local 1-71 et al. v. Canadian Forest Products Ltd.[84] (1965).

As may be seen from these examples, reviewing courts have often been unwilling to hold that arbitrators' interpretations of certain clauses of collective agreements, or arbitrators' elaboration of "proper cause", have been part and parcel of the issues referred to them and intimately bound up with these issues. Indeed, by defining narrowly the issues specifically referred, courts have treated their power to review as if they had before them commercial

arbitrations where the parties had chosen to refer their whole dispute to arbitration without separating out for reference specific issues of law or fact.

In contrast, in exercising the power to define the submitted issues, a few courts have taken a wide view and consequently have denied their power to set aside the awards for alleged error within the defined ambit. Two examples follow.

(1) Union grieved that employees were entitled to certain pay for hours which they alleged were "travelling time" under the collective agreement. Arbitrators made a determination by invoking a section of the collective agreement which (in the opinion of the reviewing court) was unrelated to the issue. Upon motion for judicial review, the British Columbia Supreme Court held that the arbitrators' use of the particular section (while seemingly without reason) was part of the arbitrators' reasoning on the issue of interpretation submitted to them, and thus could not be reviewed as collateral: Re International Union of Operating Engineers, Local 115 v. Ben Ginter Construction Co. Ltd.[85] (1966).

(2) Union grieved that employees were entitled to be paid a certain job rate. In determining that the employees were entitled to a lower rather than a higher rate, arbitrators interpreted the contract phrase "hiring rate" in a certain way.

Upon motion for judicial review, the Newfoundland Supreme Court held that the submitted issue of determining the job rate comprised interpreting the words of the clause containing the phrase "hiring rate", and that this was not a collateral issue subject to judicial review: Bakery and Confectionery Workers' International Union of America, Local 381 v. Mammy's Bread Ltd.[86] (1965).

As may be seen, the courts in the last two examples conceded that steps in the arbitrators' reasoning towards determination of the submitted issues, which involved interpretation of terms of the collective agreement, were part of that issue and were thus not reviewable. This conception of the unreviewable scope of arbitrators' determinations more accords with ordinary industrial practice in submitting grievances for resolution by arbitration.

A few words may be said about a fundamental aspect of judicial review which apply here and to review by way of certiorari discussed immediately below: the assertions by courts that the issue of the meaning of terms in a collective agreement, i.e., interpretation of the terms, is a "question of law" and that, as a "question of law", arbitrators' determinations of the meaning may ordinarily be reviewed. The validity of these assertions, which are illustrated by the above examples, are commonly taken for granted by reviewing judges. However, I submit that the judicial labelling of this arbitral

function as "law" is wrong, and that the corollary that the function may ordinarily be reviewed is equally wrong.

The terms "law" and "fact" have had a career of curious and confusing definition. For the sake of clarity, it is important to define the two words with an eye to the reason for definition in the particular context. Merely because a court wishes to review a determination made by another tribunal cannot be a good reason for the court labelling that determination "question of law".

Insofar as the functions of the courts of general jurisdiction are concerned, they perform three tasks[87]: they determine the ad hoc factors between the parties in litigation before them; they create or elaborate rules and standards which are generalised and are equally applicable to all persons involved in like disputes; and they apply these rules or standards to the ad hoc factors between the parties in order to determine their dispute. The first task is "fact-determination" and usually constitutes the jury-function of finding out what happened; the second task is "law-creation" and usually constitutes the judge's statement of rules of common law and his interpretation of relevant statutes; the third task is "law-application". While a private contract between parties to litigation is their "private law" enforceable by the court, when the court elaborates the words of the contract, this task does not result in the creation or elaboration of any

general rules or standards which are equally applicable to all persons involved in like disputes. While between the parties themselves the contract elaboration may be fixed and continuing, so indeed is the court's determination of all other ad hoc factors between them, viz, the basic facts of what happened. Thus, in the most significant sense, court interpretation of the litigants' private contract is not determination of a question of "law" but rather determination of a question of "fact".

The long-standing assertion that contract interpretation is law-making appears to be based on the circumstances that historically at jury trials the judge has performed the task of contract interpretation, and that the task is similar in many respects to statutory interpretation. We may see that both of these circumstances relate to the function of a contract as the parties' "private law". Beyond this, these circumstances do not support the assertion that contract interpretation is "law-making" in the same sense as judicial elaboration of statutory or common law rules or standards.

(b) Review by Way of Certiorari

The Court of Appeal for Ontario has held that, due to the statutory compulsion upon the parties under the Ontario Labour Relations Act to arbitrate contract disputes, arbitrators subject to that Act are statutory tribunals whose conduct and awards are reviewable by way of certiorari: Re International

Nickel Company of Canada Ltd. v. Rivando[88] (1956). Further, despite the contrary earlier opinion of several judges of first instance[89], on review by way of certiorari the court is not limited by substantive doctrine born of commercial arbitration. All the grounds of review applicable to any inferior statutory tribunal may be invoked, including error of law manifest on the face of the record--even error in arbitrators' determination of the specific issues of "law" referred to them: Regina v. Barber et al; ex parte Warehousemen and Miscellaneous Drivers' Union, Local 419[90] (1968).

As in the doctrine applied to labour arbitrations reviewed under Arbitration Acts, an issue of interpretation of the collective agreement is here held to be a "question of law". However, under the former doctrine, the court may not review at all the arbitrators' interpretation--even if the court believes that it is erroneous--if the issue of interpretation was specifically referred to the arbitrators; but, if the reviewing court holds that the issue of interpretation was not referred to them, the court may substitute its interpretation for that of the arbitrators. In contrast, upon review by way of certiorari, although the court may review all interpretations of the collective agreement made by the arbitrators, even if the court disagrees with the interpretations, the court will not find "error of law" unless the arbitrators have given a meaning to the terms of the agreement which the language will not reasonably bear: Re

Canadian Westinghouse Co. Ltd. and Local 164, Draftsmen's Association of Ontario[91] (1961); Re Sudbury Mine, Mill and Smelter Workers' Union, Local 598 and International Nickel Company of Canada Ltd.[92] (1962); Regina v. Barber et al.; ex parte Warehousemen and Miscellaneous Drivers' Union, Local 419[93] (1968).

Again, I submit that the courts here erroneously label contract interpretation as a "question of law" and therefore erroneously hold the interpretations to be subject to review for error. Even the limitation of legal error to awards where arbitrators have "unreasonably" interpreted contract language takes too little account of labour relations factors which may render an interpretation eminently reasonable to informed arbitrators but quite unreasonable to uninformed judges. Nevertheless, insofar as this limitation results from judicial recognition of the exclusive duty of arbitrators to determine contract disputes and results in a certain judicial restraint, the limitation grants leeway to arbitrators in their performance of this duty. In addition, the limitation as stated may contain the germ for a more appropriate theory of judicial review.

Because of the traditional labels built into review by way of certiorari, Ontario courts have often translated their determination of arbitrators' error into the language of jurisdiction. For example, in Re International Nickel

Company of Canada and International Union of Mine, Mill and Smelter Workers, Local 637[94] (1959), the arbitration award did not clearly state that there was no just cause for dismissal but nevertheless determined that the grievor should not have been dismissed and ought to be reinstated. In quashing the award, the Court of Appeal for Ontario held that these determinations were made beyond the arbitrators' jurisdiction. And, in Regina v. Krever et al.; ex parte International Chemical Workers Union, Local 161[95] (1968), the Ontario High Court held that the arbitrators' award (which seems clearly to have constituted an interpretation of the collective agreement) did not address itself to interpretation, but instead enlarged the terms of the collective agreement thereby causing the arbitrators to exceed their jurisdiction. In Regina v. Barber et al.; ex parte Warehousemen and Miscellaneous Drivers' Union, Local 419[96] (1968), the Court of Appeal for Ontario used similar language to describe the effect of the arbitrators' interpretation of the collective agreement.

The language of jurisdiction unquestionably has meaning when used in assertions concerning the authority of a deciding body to determine certain questions and the body's performance of the task of determination. The language loses meaning when employed, perhaps without conscious desire on the part of the speaker, to serve as a label for his disagreement with the determination itself.

(c) Hints of a More Generalised Theory of Scope of Review

In only two cases has the Supreme Court of Canada remarked upon the appropriate scope of judicial review of labour arbitrations, in both of which review was available only under the provincial Arbitration Act or the court's inherent jurisdiction to review arbitrations: Howe Sound Company v. International Union of Mine, Mill and Smelter Workers (Canada), Local 663[97] (1962); Re International Association of Machinists and Aerospace Workers, Flin Flon Lodge 1848 et al. and Hudson Bay Mining & Smelting Co. Ltd.[98] (1967). In Howe Sound, the employer had challenged the arbitrators' determination of the arbitrability of the disputed matter. Mr. Justice Cartwright, delivering reasons for the unanimous Supreme Court, remarked obiter dictum that the reviewing judge of first instance should not have entered upon interpretation of the collective agreement (even though the judge had held that the arbitrators' determination had resulted from the only possible interpretation of the contract language), but rather should have limited himself to determining whether the arbitrators had jurisdiction to determine the question of arbitrability referred to them. In Hudson Bay Mining, the unanimous court held that the arbitrators had directed themselves to the question of interpretation put to them, that in deciding this question they had not amended the collective agreement, and that they had therefore not exceeded their jurisdiction. In the

language of the reasons for judgment (particularly in the light of the reasons of the judge at first instance and in the Court of Appeal for Manitoba[99] there is a strong hint that the Supreme Court favoured as one test of jurisdiction the question whether the arbitrators' interpretation was one which the language of the collective agreement might reasonably bear.

5. REVIEW OF SUBSTANTIVE AND ADJECTIVAL DOCTRINE APPLIED BY ARBITRATORS

In the individual arbitration and even more through numbers of arbitrations in the course of time, labour arbitrators of necessity formulate generalised principles, standards and rules of substantive doctrine and apply these to determine individual grievances. This arbitral doctrine--"arbitral jurisprudence", as some writers have called it--is not drawn from the language of the collective agreement before the particular arbitrators but rather from the specific and general facts of on-going industrial life of which the experienced labour arbitrator is informed by evidence or takes judicial notice. These principles, standards and rules are truly substantive law in two senses. They are formulated by arbitrators in the same manner and from the same sources as the common law which has been created by courts of general jurisdiction, and the arbitrator applies them to determine disputes before him on the assumption (more and more justified) that they ought to be applied and will be applied to determine like disputes involving other

parties. Furthermore, to the extent that the arbitrator succeeds in his formulation of this substantive doctrine in accommodating the multitude of conflicting claims in the industrial setting and succeeds in giving due recognition to the reasonable expectations of employer, employee and union involved in the regime of collective bargaining, these principles, standards and rules are "good law".

Labour arbitrators have also fashioned rules of procedure and of evidence for arbitration hearings, including rules concerning which party should lead evidence first and which party bears the burden of persuasion on given substantive issues. For the most part, these rules have been modelled upon court rules of procedure and evidence. However, to maintain the informal atmosphere and non-technical nature of labour arbitration and to accommodate factors perculiar to the in-plant collective bargaining relationship, these rules have often been more permissive than their court counterpart. For example, arbitrators tend to admit hearsay evidence more freely than do judges in court.

The synopsis below of the treatment given by reviewing courts to these developments of arbitral law does not reveal judicial sympathy. Instead, it shows a general insistence by many judges that labour arbitrators tailor their adjudications to mirror court proceedings.

(a) Rules of Evidence

Upon review under provincial Arbitration Acts and by way of certiorari, lower courts have uniformly insisted that labour arbitrators must apply court rules concerning relevancy and admissibility of evidence: Re Pacific Western Airlines Ltd. and Pacific Western Airlines Pilots' Association[100] (1959); Re Arbitration between Super-Valu Stores (B.C.) Ltd. and Retail Food and Drug Clerks' Union, Local No. 1518[101] (1960); Re Civic Employees' Union, No. 43 and Municipality of Metropolitan Toronto[102] (1962); Re Canadian Air Line Pilots Association and Pacific Western Airlines Ltd.; ex parte Bray[103] (1963); In re Arbitration between International Woodworkers of America, Local 1-405, and Passmore Lumber Co. Ltd.[104] (1964); Re International Union of Operating Engineers Local 115, and Ben Ginter Construction Co. Ltd.[105] (1965); Regina v. Barber et al.; ex parte Warehousemen and Miscellaneous Drivers' Union, Local 419[106] (1968).

Indeed, in the Barber case, the Court of Appeal for Ontario categorically denied that arbitrators subject to the Ontario Labour Relations Act could admit extrinsic evidence in the absence of documentary ambiguity nor rely on hearsay evidence even under the authority of the statutory provision[107] permitting arbitrators "to accept such oral or written evidence as the arbitrator...in [his] discretion deems proper, whether admissible in a court of law or not." To say the least, this ruling is questionable both in view of the clear words in the statute and the need for flexibility in grievance arbitration

hearings.

Finally, at least one court of first instance has set aside an award where the court disagreed with the standard of proof applied by the arbitrators in testing the employer's evidence in a discharge arbitration: Peters' Ice Cream Co. Ltd. v. Milk Sales Drivers and Dairy Employees' Union, Local 464[108] (1961).

(b) Rules Barring a Claim

The Ontario High Court has refused to permit arbitrators to apply their version of the equitable doctrine of laches to a tardy union grievance. Instead, the court directed that the claim should be barred only if the arbitrators determined that the terms of the collective agreement outlawed late grievances and that the evidence before the arbitrators revealed tardiness coming within these terms: Re Ottawa Newspaper Guild, Local 205 and The Ottawa Citizen[109] (1965). In contrast, the British Columbia Supreme Court has held that arbitrators' application of the doctrine of equitable estoppel was reviewable as an issue of law collateral to the referred matters, and that the arbitrator was bound to use estoppel exactly as elaborated in the courts: Re Ben Ginter Construction Co. Ltd. and International Union of Operating Engineers, Local 115[110] (1967).

(c) Substantive Principles, Standards and Rules of Decision: Common Law v. "Industrial Common Law"

To date, very few attacks have been made upon labour arbitration awards on the ground that the arbitrators have applied as the rule of decision substantive arbitral doctrine which varied from judge-made common law. However, in two of the three cases where the attack has been grounded on this argument, the attitude evinced by the courts threatens to destroy arbitrators' continued authority to generate arbitral jurisprudence.

In Re Canadian Gypsum Co. Ltd. and Nova Scotia Quarryworkers Union, Local 294[111] (1959), the majority of the Nova Scotia Supreme Court en banc insisted that in a discharge arbitration the arbitrator must determine just cause by applying the same rules as a court in a wrongful dismissal lawsuit. More recently, in Regina v. Fuller et al.; ex parte Earles and McKee[112] (1968) the Court of Appeal for Ontario appeared to hold that, in the absence of provision in the collective agreement to the contrary, all common law rules concerning the relationship of master and servant are applicable under the collective agreement. Both decisions strongly conflict with the reasoning of the Court of Appeal for Ontario (differently constituted from the court in the Fuller case) in Regina v. Arthurs et al.; ex parte Port Arthur Shipbuilding Co.[113] (1967). In the Arthurs case, the majority of the court relied heavily on the changes wrought

in the common law master-servant relationship by labour relations statutes and collective bargaining, in supporting arbitrators' complete authority to review all employment circumstances when determining just cause for discharge.

(d) Substantive Rules of Decision: Statute Law

While I argue that reviewing courts should not forcibly impose upon labour arbitrators substantive and adjectival law born of court litigation, the rationale of this argument does not apply when the arbitrator is obliged to invoke statute law in his determination. Arbitral doctrine fashioned from the "legislative facts" of industrial life is used by arbitrators only in the context of collective agreement disputes. However, statute law is promulgated by the legislature for application to all persons in the community coming within its ambit, and the courts of general jurisdiction are the agencies of the state finally to interpret this law. If a reviewing court is of the opinion that an arbitrator has erred in his interpretation of a statute, there should be no inhibition upon judicial correction.

In Shipping Federation of British Columbia, and International Longshoremen's and Warehousemen's Union, Local 501[114] (1960), the British Columbia Supreme Court reviewed and agreed with the determination of arbitrators that the Canada Act does not prevent application to a collective agreement of the common law rule that fundamental breach of an

agreement by one party discharges the other party from performance. In Re Polymer Corporation, and Oil, Chemical and Atomic Workers' Union, Local 16-14[115] (1961), also judicial review of an award subject to the Canada Act, the Ontario High Court denied that determination of any collective agreement by repudiation was possible due to the particular nature of collective agreements. The Ontario courts in Regina v. Fuller et al.; ex parte Earles and McKee[116] (1967) applied the Polymer reasoning upon review of an arbitration award where arbitrators subject to the Ontario Labour Relations Act had allegedly found termination by the union's repudiation: the courts fortified their conclusion by holding that section 39(3) of the Ontario Act[117] prevented ending of the operation of a collective agreement except as provided in the section.

Despite the readiness of Canadian courts to correct errors of "law" committed by arbitrators, the courts of Ontario recently refused to guide an arbitrator in correct statutory interpretation before he had rendered his own interpretation in the award. In International Union, United Automobile, Aerospace and Agricultural Implement Workers of America Local 707 v. Ford Motor Company of Canada Ltd.[118] (1966), in the course of determining discharge grievances, the arbitrator was obliged to determine the effect of statutory regulations issued under the Hours of Work and Vacations with Pay Act[119]. In the alleged absence at the hearing of sufficient evidence on the point, the arbitrator

refused to determine whether the licence issued to the employer under the regulations authorized the overtime hours of work requested by the employer. Upon judicial review, although the union requested that the judge of first instance and the Court of Appeal remit the award to the arbitrator with directions on the applicable law, both courts refused, insisting that the arbitrator must first determine the issues presented to him. The courts' reluctance here to clarify the applicable statute law is curious, especially since they unquestionably would quash the award upon a later application if the arbitrator had erred in interpreting the statutory regulations as they directed him to do. For the sake of efficiency in administration of the judicial as well as the arbitration processes, the court should have obviated the possibility of later review on this question of interpretation.

(e) Remedial Doctrine

The leading authority here is the famous Polymer case[120], where all reviewing courts founded the authority of the labour arbitrator to award damages for the union's breach of the no-strike clause in the intention of the parties evinced in the collective agreement and in the legislative direction of the Canada Act for final settlement of all differences between the parties. However, labour arbitrators commonly award remedies that go beyond the court-like remedy of damages. They order reinstatement in cases of improper dismissal; they abridge periods of suspension in cases of undue discipline;

they order revocation of promotions in cases of improper promotion.

To date, only one reported judicial attack has been made upon arbitrators' exercise of such non-court remedial authority. In Regina v. Arthurs et al.; ex parte Port Arthur Shipbuilding Co.[121] (1966), the judge of first instance and the dissenting judge in the Court of Appeal for Ontario denied that arbitrators have the authority, in the absence of empowering provisions in the collective agreement, to substitute suspension for improper discharge. Of the majority in the Court of Appeal, Mr. Justice Wells founded this authority on the reasoning in Polymer and upon the duty of arbitrators under the Ontario Labour Relations Act to render a "final and binding settlement"[122]. Mr. Justice Laskin cautiously declined to determine the point[123]. In view of the arbitrators' function to adjust the ongoing collective bargaining relationship between parties, there is little doubt that the analysis of Mr. Justice Wells grants to the arbitrator requisite flexibility in remedial authority.

6. UNANIMITY OF THE AWARD

Unless the collective agreement or the applicable labour relations statute specifically authorizes the validity of an award by a majority of a board of arbitration, such an award is a nullity: Western Clay Products Ltd. v. United Glass & Ceramic Workers of North America, Local 214[124] (1965). This holding may create difficulties in arbitrations across

Canada since no labour relations statute authorizes majority awards where the parties themselves have included an arbitration clause in the collective agreement.

7. FINALITY OF THE AWARD

As in review of trial proceedings and commercial arbitrations, courts reviewing labour arbitrations have applied a doctrine of finality to the written awards. Once the arbitrators have reduced the award to writing and have performed all else to perfect it, they are functus officio and cannot vary the award except to correct clerical errors: Re Nelsons Laundries Ltd. and Laundry, Dry Cleaning and Dye House Workers' International Union, Local 292[125] (1964); Munger v. Cité de Jonquière[126] (1962). The court will set aside any attempted substantive variation of the award or any fresh award issued after the arbitrators have satisfied these conditions.

PART THREE: JUDICIAL REVIEW IN THE UNITED STATES

Before I proceed to set out suggested changes in procedure and doctrine in Canada, it is useful to outline the theory and scope of judicial review in the United States where national legislative labour relations policy has paralleled our own. In the United States, the National Labour Relations Act of 1935[127] implemented the first of the three requisites which are part of Canadian labour legislations, viz., the employer and a trade union duly

representing its employees must bargain in good faith toward the negotiation of a collective agreement covering these employees. However, unlike Canadian legislation, neither the National Labour Relations Act nor the Labour-Management Relations Act of 1947[128] contains any prohibition against strikes or lockouts during the currency of collective agreements nor any direction that the parties must settle disputes arising from the agreement by arbitration. Instead, the Labour-Management Relations Act created the Federal Mediation and Conciliation Service "to assist parties to labour disputes.. to settle such disputes through conciliation". As far as arbitration of contract disputes is concerned, the Act merely sets out two statements of legislative policy: "..it is the policy of the United States that..the settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for..voluntary arbitration to aid and encourage employers and the representatives of their employees to..maintain agreements concerning rates of pay, hours, and working conditions, and to make all reasonable efforts to settle their differences by mutual agreement through..such methods as may be provided for in any applicable agreement for the settlement of disputes"[129]; and "[f]inal adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing

collective-bargaining agreement"[130]. The Act also grants jurisdiction to federal courts to entertain suits for violation of collective agreements.[131]

Despite the lack of statutory compulsion to arbitrate contract disputes, where the parties have voluntarily included an arbitration clause in their collective agreement, the United States Supreme Court in the famous Steelworker Trilogy (1960)[132] has invoked the statements of legislative policy in the Labour-Management Relations Act and analysis of labour arbitration founded in the writings of Archibald Cox[133] and Harry Shulman[134] to elaborate doctrine of judicial review which differs from the counterpart in commercial arbitration. This doctrine explicitly recognizes the central position of labour arbitration in peaceful labour-management relations and the narrow ambit of court review consistent with this position.

On the nature of collective agreements, the court said[135]:

> "The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate...The collective agreement covers the whole employment relationship. It calls into being a new common law--the common law of a particular industry or of a particular

plant...A collective bargaining agreement is an effort to erect a system of industrial self-government. When most parties enter into a contractual relationship they do so voluntarily, in the sense that there is no real compulsion to deal with one another, as opposed to dealing with other parties. This is not true of the labour agreement. The choice is generally not between entering or refusing to enter into a relationship, for that in all probability pre-exists the negotiations. Rather it is between having that relationship governed by an agreed upon rule of law or leaving each and every matter subject to temporary resolution dependent solely on the relative strength, at any given moment, of the contending forces. The mature labour agreement may attempt to regulate all aspects of the complicated relationship, from the most crucial to the most minute over an extended period of time. Because of the compulsion to reach agreement and the breadth of the matters covered, as well as the need for a fairly concise and readable instrument, the product of negotia-

> tions (the written document) is, in the words of the late Dean Shulman, 'a compilation of diverse provisions: some provide objective criteria almost automatically applicable; some provide more or less specific standards which require reason and judgment in their application; and some do little more than leave problems to future consideration with an expression of hope and good faith.'...Gaps may be left to be filled in by reference to the practices of the particular industry and of the particular shops covered by the agreement. Many of these specific practices which underlie the agreement may be unknown, except in hazy form, even to the negotiators..."

On the function of grievance and arbitration procedures, the court said[136]:

> "...[T]he grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their

> solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content is given to the collective bargaining agreement."

On the differences between commercial arbitrations and their judicial review, on the one hand, and labour arbitrations and their review, on the other, the court said[137]:

> "...[T]he run of arbitration cases... become irrelevant to our problem. There the choice is between the adjudication of cases or controversies in courts with established procedures or even special statutory safeguards on the one hand and the settlement of them in the more informal arbitration tribunal on the other. In the commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife. Since arbitration of labour disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts towards

> arbitration of commercial agreements has no place here. For arbitration of labour disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself."

On the differences between the labour arbitrator and the judge as adjudicator, the court said[138]:

> "The labour arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts...The labour arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law--the practices of the industry and the shop--is equally a part of the collective bargaining agreement although not expressed in it. The labour arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. The parties expect that his judgment of a particular grievance will

> reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished. For the parties' objective in using the arbitration process is primarily to further their common role of uninterrupted production under the agreement, to make the agreement serve their specialized needs. The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed."

On the outer limits of the arbitrator's function, and the inner limits of judicial review, the court said[139]:

> "When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situation. The draftsmen may never have

> thought of what specific remedy should be awarded to meet a particular contingency. Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award."

The analysis of the Supreme Court of the United States gives due weight to the function of the arbitrator within the collective bargaining context, while at the same time indicating in a general way the outer limits of his power. The court also articulates the salient reasons for restricting the role of reviewing judge vis-a-vis labour arbitrator operating pursuant to legislative policy: the peculiar nature of the collective agreement as an indispensable instrument of industrial peace--a nature quite foreign to the common law tradition and to the understanding of most judges; the role of labour arbitration as a technique of adjusting to the exigencies of immediate problems the on-going relationship under the collective agreement;

and the arbitrator's particular understanding of the industrial context and his use of this context as source for rules and standards of decision--an understanding and a source also foreign to common law tradition and judge. However, because of the particular issues involved in the appeals, the court does not purport to canvass problems of judicial review beyond those associated with the arbitrator's interpretive function.

PART FOUR: SUGGESTED CHANGES

Both legislative direction and the requisites of the collective bargaining relationship dictate that disputes arising from collective agreements should be determined by arbitration. Therefore, procedures and standards of judicial review should not hinder the continued effective operation of the labour arbitration process. At the same time, the procedures and standards must permit reviewing courts to bring to bear upon labour arbitration their tradition and institutional experience and permit them to exercise their responsibility to maintain the integrity of general statute and common law, and indeed of the legal system itself. The problem is not, as some colleagues argue, how to prohibit courts from interfering with labour arbitration, but rather how to accommodate the functions, duties and experience of labour arbitrator and court. It is the problem of dividing off the jobs appropriate to each.

I shall deal with aspects of this problem in the following order: methods to strengthen the authority of labour arbitrators and the arbitration process, timing of judicial review, prerequisite to judicial review, procedure and scope of judicial review, and standards of review.

A. METHODS TO STRENGTHEN THE AUTHORITY OF LABOUR ARBITRATORS AND THE ARBITRATION PROCESS

The labour relations statutes should be amended where necessary specifically to provide for the following: (1) among the disputed matters which arbitrators shall finally determine is any question whether a matter is arbitrable; (2) if the collective agreement provides for arbitration by a three-man board, the award of the majority (or, if no majority, of the chairman) shall constitute the award of the board; (3) in the event that the collective agreement does not contain an arbitration clause of at least minimum conformity with statutory requisites, a detailed arbitration clause set out in the statute shall then conclusively be deemed to be part of the agreement; (4) if a party fails to appoint an arbitrator pursuant to the statute or collective agreement, the Minister shall make the appointment; (5) arbitrators shall have power to issue subpoenas, administer oaths, accept such evidence as they deem fit, enter premises, make inspections, and authorize other persons to act therein on their behalf; (6) arbitrators shall have power to relieve against all

defects in pre-arbitration procedures so long as factually there was no substantial prejudice to either parties; (7) the final award shall bind the parties to the collective agreement and the affected employees; (8) the final award may be entered and enforced as a judgment of the superior court (awards subject to the Canada Act, as a judgment of the Exchequer Court).

The reasoning which underlies these suggested statutory amendments needs no elaboration. The Ontario Labour Relations Act[140] provides a model for the implementation of many of these suggestions.

B. TIMING OF JUDICIAL REVIEW

Except where a party alleges manifestbias in an arbitrator, there should be no judicial review until after the award on the substantive issues is final. Motions for a stated case under the Arbitrations Acts or for prohibition should be abolished.

As much as may be consistent with fairness to the parties, labour arbitrators should be free to determine all issues--procedural and substantive--without interruption caused by court application in mid-arbitration. This freedom will assist to render arbitration more expeditious, and to strengthen the authority and incentive of arbitrators to model and promulgate

appropriate arbitral doctrine. If a party is aggrieved by arbitrators' conduct in mid-hearing, in the event that the award is later in his favour he obviously will not be injured by postponement of judicial review. If the award is ultimately against him, except in the instance of manifest bias the value to arbitration of postponement outweighs injury to him.

By "manifest bias in an arbitrator", I mean bias in the sense of Szilard v. Szasz[141] with the necessary qualifications applied by courts to nominees. I recommend permitting advance review on this ground because hearings conducted by such arbitrators harm the moral authority of labour dispute adjudication, thus outweighing the advantage of speed in determination.

C. PREREQUISITE TO JUDICIAL REVIEW

The claim of litigants to appeal to a superior tribunal from all judicial determinations at first instance is common and deeply felt. It appears to result from the widely-held belief that up to a certain point the more judicial heads successively applied to a problem, the more likely the ultimate determination will be "just" and "right". The certain point is reached when the disadvantages of delay and expense in ultimate determination are felt to outweigh the advantages of further attempts to achieve a "right" determination.

The claim to appeal is also felt in respect to labour

arbitration. However, here the disadvantages of delay and expense are of uppermost importance. In addition, the ordinary presupposition of appeal in the court system is missing, that is, successive appellate tribunals who understand the nature of the problem under review as well as the tribunal of first instance. The claim for review must somehow be accommodated by a system of review which minimizes these disadvantages.

This may be achieved by instituting through statutory amendment a formal system of review by re-hearing before the original arbitrators as a mandatory prerequisite to judicial review[142]. The system might work as follows: After the award has first been issued, it will not be "final" until a short period of time has elapsed, for example, ten days. During that time, a party who alleges that the arbitrators committed any error of law or fact may, upon notice to the opponent, request of the arbitrators a re-hearing or reconsideration upon assigned points of error. "Fact" here includes any determination of "what happened"; while "law" includes defect in due process at the hearing, absence of evidence on a determined fact, statement or elaboration or application of a rule or standard of substantive or adjectival law, and interpretation of the meaning of the collective agreement, including determination of arbitrability. In the event that no such request is made, the original award becomes final at the end of the period of time. However, upon such request,

the arbitrators must entertain argument from the parties on the question whether they should re-hear or reconsider the assigned points. If the arbitrators deny the request, they must issue written reasons for their decision, and the original award becomes final at that time. If the arbitrators decide to rehear or reconsider upon any assigned points, the hearing, procedure, and any new determination will be restricted accordingly. After re-hearing or reconsideration, the arbitrators will issue a fresh final award incorporating examination of the assigned points, and reversing, amending or reconfirming the original award.

By permitting a complaining party to focus upon specific alleged errors and to request the arbitrators to correct them, this procedure attempts to satisfy the simple desire for "justice" and "correct" determination through review. At the same time, by limiting the time for review, by making request for review a prerequisite to court motion, by keeping review before the original adjudicators, and by requiring their prior determination of merit in the request, delay and expense will be kept to a minimum and the initial reviewing tribunal will obviously be qualified to consider the alleged errors.

This procedure will also tend to strengthen the labour arbitration process and the collective bargaining

relationship. By assuring the parties that the arbitrators have thoroughly considered all important aspects of the grievance, the procedure will enhance the authority of the final award and discourage subsequent court review. In addition, it will protect but constitute an appropriate check upon the continuing creation of arbitral doctrine. And, by providing a method to have the arbitrators' significant errors corrected within the collective agreement machinery, the procedure will avoid the parties' harmful reactions to error.

D. PROCEDURE AND SCOPE OF JUDICIAL REVIEW

Judicial review pursuant to the Arbitration Acts and rules of court to invoke inherent jurisdiction, and by certiorari should be statutorily abolished. In their stead, the labour relations statutes should be amended to provide for judicial review by summary motion.

Where the allegation is "manifest bias", the applicant might move in mid-arbitration within a reasonable time after discovering the alleged fact. In all other cases, the applicant on the motion might move only upon a "final" award, and might raise only determinations made against him on points of "law" assigned before the arbitrators. In the event that the arbitrators had refused entirely to re-hear or reconsider, the applicant on the motion, if he had assigned errors before

the arbitrators, might now raise before the court all errors of law previously assigned. As defined in the previous section, "law" in this context includes defect in due process at the hearing, absence of evidence on a determined fact, statement or application or elaboration of a rule or standard of substantive or adjectival law, and interpretation of the meaning of the collective agreement including determination of arbitrability.

Under this procedure, the applicant for judicial review would be limited to raising alleged "errors of law" which the arbitrators had twice considered, and at least once determined against the applicant. Because the applicant would have had an earlier opportunity for full review before the arbitrators, this limitation is not unfair.

E. STANDARDS OF REVIEW

Within the scope of matters which the court may properly review, the court should apply standards born of restraints similar to those applied when an appellate court is asked to reverse findings of fact in a civil case by a jury or by a judge sitting alone. Regarding the former, the appellate court places great stress upon the traditional secrecy of the jury's deliberations and the imprecision of their findings. Because of these considerations, the appellate court will not reverse findings by a jury unless they are so

completely unreasonable and unjust that the appellate court is satisfied that the jury really did not perform their job[143]. Regarding the latter, the appellate court stresses the peculiar advantage possessed by the trial judge personally to evaluate the witnesses and their testimony and the relative disadvantage in this respect of the appellate court which has before it only a written record of the trial proceedings. Because of these considerations, the appellate court will not reverse the judge's findings which depend on this evaluation at trial unless the court is convinced that the findings are clearly wrong[144]. However, in both instances an appellate court (and indeed the trial judge himself) will not permit the trier of fact to find any facts in dispute unless the evidence rationally permits the findings[145].

In the case of fact-determinations by juries, the basic consideration in the appellate court's self-imposed restraint is the court's traditional respect for the due operation of the historical system of fact-determination by law juries. In the case of fact-determination by a trial judge, the basic consideration is the appellate court's recognition that it does not have knowledge of crucial data required to second-guess the trial judge. But, where the court refuses to permit any fact-determination, it exercises supervisory power based upon its responsibility to prohibit irrational determinations.

Analogous considerations should motivate courts reviewing labour arbitrations to raise judicial restraints of equal force. The courts should respect determination of disputes by non-court adjudicatory tribunals established under legislative labour relations policy for that specific purpose. The court should also clearly recognize that often they do not have experience with the kinds of problems brought to arbitration nor knowledge of crucial data required to second-guess labour arbitrators. However, to the extent that the matters under examination upon judicial review raise problems falling within the traditional and institutional experience or duties of courts, they need not impose these restraints. Among the latter, I include the assessment of rational basis for fact-finding, determination of the requisites of natural justice, and elaboration of statute law.

I propose that the tests of arbitral propriety born of commercial arbitration and from the doctrine surrounding certiorari should be abandoned. In their place, I propose as judicial tests several questions which a reviewing court should ask: "Does the impugned matter involve problems which raise the traditional and historic experience of courts? To the extent that this court cannot say that the matter clearly does raise this experience, and allowing for courts' general inexperience in collective agreement administration and dispute settlement, is the determination of the arbitrators on the

impugned matter beyond the limits of rationality?"

Several of the reasons for the proposed tests are evident from preceding paragraphs. The test of "beyond the limits of rationality" is designed to avoid the consequence of a decision by a reviewing judge that a particular determination is "unreasonable" after an arbitrator had decided that it was quite "reasonable".

I will illustrate application of these tests to problem areas canvassed in PART TWO of this Report.

1. ARBITRABILITY OF THE SUBMITTED ISSUES

Determination of arbitrability demands arbitrators' understanding of the labour relations background and interpretation of the collective agreement in the light of that background. This determination does not raise the ordinary experience of courts. Therefore, a reviewing court should simply ask whether the arbitrators' determination is clearly inconsistent as a matter of rationality with the terms of the collective agreement.

2. DUE PROCESS IN THE HEARING

Arbitrators' determinations here require allowing the parties (particularly the bargaining agent) considerable leeway in processing grievances and presenting them at the hearing. Therefore, the determination requires some apprecia-

tion of the labour relations background. However, courts have historically determined the requisites of natural justice before various tribunals by ad hoc accommodations of abstract fairness with the demands of the tribunals' particular policies. Courts are therefore equipped to order similar accommodation in arbitration hearings after making allowance for their inexperience with the possible labour relations factors involved. Courts would continue to resolve problems of notice, representation, and ex parte consultations as these problems are now resolved.

3. REVIEW OF ARBITRATORS' DETERMINATION OF THE MERITS OF THE GRIEVANCE

The court will continue to review awards to assure that arbitrators have performed the jobs directed by the statute and requested by the parties, viz., determination of the particular problem submitted by the parties arising out of the interpretation, application, administration or alleged violation of collective agreements. In the current parlance, courts will assess whether arbitrators have "gone beyond their jurisdiction" or "denied themselves jurisdiction". But, in making the assessment, courts will interfere only if they conclude clearly that as a matter of rationality the arbitrators did not consider the problems put to them. When applicants attack alleged errors of interpretation of collective agreements, the sole question for the courts will be whether the determinations are clearly inconsistent as a matter of rationality

with the terms of the particular collective agreements[146].

4. REVIEW OF SUBSTANTIVE AND ADJECTIVAL DOCTRINE APPLIED BY ARBITRATORS

Reviewing courts should not examine arbitrators' statements and application of "industrial common law" or remedies, as such. These matters should bear only upon the factors of due process in the hearing, and their rational consistency with the problems put and the terms of the particular collective agreements. However, where arbitrators clearly err in their elaboration and application of statute law, courts as the authoritative institutional interpreters of statute law may intervene to correct them. Courts might also be warranted in correcting arbitrators' clear error in elaborating and applying judge-made common law doctrine. In both instances, however, reviewing courts should first make due allowance for the significance of possible labour relations factors in arbitrators' elaboration.

5. FINALITY OF THE AWARD

Reviewing courts should continue to exercise power as at present to limit arbitrators' attempted variation of final awards.

In all events, statutory amendment should clearly provide that no award should be set aside because of any errors

of arbitrators unless the errors have clearly caused a substantial wrong or miscarriage of justice.

FOOTNOTES

1. P.C. 1003 (Canada), 1 S.O.R. 1944, 439

2. P.C. 1003

Section 21(3) No employer who is party to a collective agreement shall declare or cause a lockout and no employee bound thereby shall go on strike during the term of the collective agreement.

3. P.C. 1003

Section 17 Where an employee alleges that there has been a misinterpretation or a violation of a collective agreement, the employee shall submit the same for consideration and final settlement in accordance with the procedure established by the collective agreement, if any, or the procedure established by the Board for such case; and the employee and his employer shall do such things as are required of them by the procedure and such things as are required of them by the terms of the settlement.

Section 18(1) Every collective agreement made after these regulations come into force shall contain a provision establishing a procedure for final settlement, without stoppage of work, on the application of either party, of differences

concerning its interpretation or violation.

(2) Where a collective agreement does not provide an appropriate procedure for consideration and settlement of disputes concerning its interpretation or violation thereof, the Board shall, upon application, by order, establish such a procedure.

4. S.C. 1948, c. 54, now R.S.C. 1952, c. 152, hereinafter called the Canada Act. The relevant sections are sections 19 and 22.

5. The respective provincial labour relations statutes are the following:

Alberta: The Alberta Labour Act, R.S.A. 1955, c. 167, amended 1957, c. 38; 1958, c. 82; 1959, c. 35; 1960, c. 54 and c. 80; 1964, c. 41; 1966, c. 13.

British Columbia: Labour Relations Act, R.S.B.C. 1960, c. 205, amended 1961, c. 31; 1963, c. 20.

Manitoba: The Labour Relations Act, R.S.M. 1954, c. 132, amended 1956, c. 38; 1957, c. 36; 1958, c. 29 and c. 67; 1959, c. 32; 1960, c. 78; 1962, c. 35; 1963, c. 41; 1966, c. 33.

New Brunswick: Labour Relations Act, R.S.N.B. 1952, c. 124, amended 1953, c. 21; 1955, c. 57; 1956, c. 43; 1959, c. 56; 1960, c. 45; 1960-61, c. 52; 1966, c. 73.

Newfoundland: The Labour Relations Act, R.S.N. 1952, c. 258, amended 1959, c. 1; 1963, c. 82; 1966, c. 39; 1967, c. 12.

Nova Scotia: Trade Union Act, R.S.N.S. 1954, c. 295, amended 1957, c. 53; 1964, c. 48; 1965, c. 53; 1967, c. 75; 1968, c. 59.

Ontario: The Labour Relations Act, R.S.O. 1960, c. 202, amended 1961-62, c. 68; 1962-63, c. 70; 1964, c. 53; 1966, c. 76.

Prince Edward Island: The Industrial Relations Act, S.P.E.I. 1962, c. 18, amended 1963, c. 20; 1966, c. 19; 1966 (2nd session), c. 3; 1967, c. 26; 1968, c. 27.

Quebec: Labour Code, R.S.Q. 1964, amended 1965, c. 14 and 50.

Saskatchewan: The Trade Union Act, R.S.S. 1965, c. 287, amended 1966, c. 83; 1968, c. 79.

Reference in this Report to the labour relations statutes

of a particular province will be to the statute of that province set out above.

6. Alberta, section 94(4)-(6)
British Columbia, section 46
Manitoba, section 22
New Brunswick, section 21
Newfoundland, section 23
Nova Scotia, section 22
Ontario, section 54(1)
Prince Edward Island, section 39
Quebec, section 95

7. Alberta, section 73(5)-(19)
British Columbia, section 22
Manitoba, section 19
New Brunswick, section 18
Newfoundland, section 19
Nova Scotia, section 19
Ontario, section 34
Prince Edward Island, section 23
Quebec, section 88-89

All sections noted here and in footnote 6, as well as the corresponding sections of the Canada Act, are reproduced in full in Appendix "A" to this Report.

8. Manitoba, section 19(4); Ontario, section 34(10). The Alberta statute also excludes the Arbitration Act, but replaces that procedure with similar procedure specifically referable to labour arbitration: section 73(15)-(18).

9. Informed estimates in 1957 and 1958 put the percentage of collective agreements in effect across the U.S.A. with arbitration clauses at over 90%. Livengood, The Lawyer's Role in Grievance and Arbitration (1958), 9 LAB. LAW JO. 495, at p. 496; Business Week magazine, June 15, 1957, page 153. Another estimate put the figure for collective agreements in 1961-62 at 94%. Jones and Smith, Management and Labour Appraisals and Criticisms of the Arbitration Process: A Report with Comments (1964), 62 MICH.L. REV. 1115, quoting from Fleming, The Labor Arbitration Process: 1943-1963, a paper delivered in January, 1964 at the 17th Annual Meeting of the National Academy of Arbitrators.

The survey conducted by Professors Jones and Smith tends to corroborate these estimates. Jones and Smith sent 290 letters of inquiry to American management representatives and lawyers, and 290 to union officials and lawyers. They received approximately 260 useful responses from the former, and 75 from the

latter. They state that "[b]y an overwhelming majority our respondents indicate that they prefer the arbitration process to the available alternatives as a method of ultimate resolution of contract application (grievance) disputes." Jones and Smith, ibid., at pages 1116-1117.

10. See Johnson, Review of Freidin, Labor Arbitration and the Courts (1953), 5 STAN. L. REV. 858.

11. United Steelworkers of America v. American Manufacturing Co. (1960), 363 U.S. 564; United Steelworkers of America v. Warrior & Gulf Navigation Co. (1960), 363 U.S. 574; United Steelworkers of America v. Enterprise Wheel & Car Corp. (1960), 363 U.S. 593.

12. Hollywood Theatres v. Tenney, [1940] 1 D.L.R. 452 (per O'Halloran J.A.)

13. Bancroft v. C.P.R. Co. (1920), 53 D.L.R. 272 (Man. C.A.) (per Fullerton J.A., obiter); Young v. Canadian Northern Railway Company, [1931] A.C. 83, at p. 89 (J.C., obiter); Wright et al. v. Calgary Herald, [1938] 1 D.L.R. 111 (Alta. App. Div.) (obiter); Murphy v. Robertson, [1941] 3 D.L.R. 30 (Man. C.A.).

14. Machinists, Fitters and Helpers Unions, Local #3 v. Victoria

Machinery Depot Co. Ltd. et al., [1953] 3 D.L.R. 414 (B.C.); Hume & Rumble Ltd. and Peterson Electrical Construction Co. Ltd. v. Local 213 of the International Brotherhood of Electrical Workers et al., [1954] 3 D.L.R. 805 (B.C.); G. H. Wheaton Ltd. v. Local 1598, United Brotherhood of Carpenters & Joiners of America et al. (1956), 6 D.L.R. (2d) 500 (B.C.); International Brotherhood of Electrical Workers Local Union 2085 et al. v. Winnipeg Builders' Exchange et al. (1967), 65 D.L.R. (2d) 242 (S.C.C.).

However, the apparent implication in these cases that all terms of a collective agreement may now be enforced in court at the suit of either party is probably wrong. Since Hamilton Street Ry. Co. v. Northcott (1966), 58 D.L.R. (2d) 708 (S.C.C.) and Close v. Globe and Mail Ltd., [1967] 1 O.R. 235 (C.A.), it is strongly arguable that, where the suit on the collective agreement between trade union and employer involves the essential function and skill of the labour arbitrator (e.g., interpretation of terms of the agreement, elaboration

of"just cause", or application of a labour relations standard), the court may not entertain the suit at all. Instead, the parties will be obliged to arbitrate under the collective agreement's arbitration clause. If I am correct, the courts will have moved beyond a simplistic assumption that a collective agreement should be treated like a contract at common law, to some recognition of the statutory obligation to arbitrate and the reason.

15. See Chamberlain, Collective Bargaining and the Concept of Contract (1948), 48 COLUM. L. REV. 829; Carlston, Theory of the Arbitration Process (1952), 17 LAW & CONTEMP. PROBS. 631, at pages 637 ff.; Cox, The Legal Nature of Collective Bargaining Agreements (1958), 57 MICH. L. REV. 1; Cox, Reflections upon Labor Arbitration (1959), 72 HARV. L. REV. 1482; Fleming, Reflections on the Nature of Labor Arbitration (1963), 61 MICH. L. REV. 1245, at pages 1259 ff. And see CARROTHERS, LABOUR ARBITRATION IN CANADA (1961), 37-41.

16. The argument in this and the following paragraph relies heavily upon Chamberlain, op. cit.; Taylor, Further Remarks on Grievance Arbitration (1949), 4 ARB. JO. 92, at p. 96; Shulman, Reason, Contract and Law in Labor Relations (1955), 68 HARV. L. REV. 999; Cox, The Legal Nature of Collective Bargaining Agreements, op. cit.; Cox, Reflections Upon Labor Arbitration, op. cit.

17. McRuer, C.J.H.C. in Re Canadian Westinghouse Co. Ltd. and United Electrical, Radio & Machine Workers of America, Local 504 (1961), 30 D.L.R. (2d) 676 (Ont. H.C.), later overruled on the point by Regina v. Barber et al.; ex parte Warehousemen and Miscellaneous Drivers' Union, Local 419 (1968), 68 CLLC para. 14,098 (Ont. C.A.).

18. British Columbia, R.S.B.C. 1960, c. 14;
New Brunswick, R.S.N.B. 1952, c. 9;
Nova Scotia, R.S.N.S. 1954, c. 13;
Prince Edward Island, R.S.P.E.I. 1951, c. 12

In Newfoundland, similar provisions are found in The Judicature Act, R.S.N. 1952, c. 114.

The applicable sections of the British Columbia Arbitration Act are here set out. Since these sections are virtually identical to those of the other provincial Arbitration

Acts, the corresponding section numbers of all Acts are inserted.

"In all cases of reference to arbitrators, the Court or a judge may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrators or umpire": British Columbia, section 13(1); New Brunswick, section 16(1); Newfoundland, section 201; Nova Scotia, section 12(1); Prince Edward Island, section 11(1).

"Where an arbitrator or umpire has misconducted himself, or an arbitration award has been improperly procured, the Court may set the award aside": British Columbia, section 14(2); New Brunswick, section 17(2); Newfoundland, section 202(2); Nova Scotia, section 13(1); Prince Edward Island, section 12(2).

"A referee, arbitrator or umpire may at any stage of the proceedings under a reference, and shall if so directed by the Court or a judge, state in the form of a special case, for the opinion of the Court any question of law arising in the course of the reference": British Columbia, section 22; New Brunswick, section 25; Newfoundland, section 209; Nova Scotia, section 20; Prince Edward Island, section 19.

Prior to amendment in 1964 by 1964, c. 41, The Alberta Labour Act did not exclude application of the Arbitration

Act from collective agreement arbitration. As amended, section 73(14)-(18) set out procedures for judicial review of labour arbitrations similar to those in the various Arbitration Acts.

19. Alberta: Re Ewaschuk; Western Plywood (Alberta) Ltd. v. International Woodworkers of America, Local 1-207 (1964), 44 D.L.R. (2d) 700; Re Gainers Ltd. and Local 319, United Packinghouse Workers of America (1964), 47 W.W.R. 544.

British Columbia: Building and General Labourers' Union, Local 602 v. Ocean View Development Ltd., [1955] 5 D.L.R. 12; Re Arbitration between International Union of Operating Engineers, Local 115 and Saguenay-Kitimat Co. (1956), 6 D.L.R. (2d) 156; Re Woods; W. H. Malkin Co. Ltd. v. Retail, Wholesale and Department Store Union, Local 580 (1959), 20 D.L.R. (2d) 776; Re the Bay Company (B.C.), and Local 170 of the Pipefitting Industry (1960), 24 D.L.R. (2d) 582; Re Peterson Electrical Construction Co. Ltd. and International Brotherhood of Electrical Workers, Locals 213 and 230 (1962), 32 D.L.R. (2d) 592; Re Alberta Wheat Pool, and Local 333 of the International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery

Workers of America (1962), 35 D.L.R. (2d) 433; Re Westeel Products Ltd. and United Steelworkers of America, Local 3229 (1964), 44 D.L.R. (2d) 325; and see Howe Sound Company v. International Union of Mine, Mill and Smelter Workers (Canada), Local 663, [1962] S.C.R. 318, at p. 330 (obiter)

New Brunswick: Local 443 of the Bakery and Confectionary Workers' International Union of America v. Atlantic Sugar Refineries Ltd. (1960), 25 D.L.R. (2d) 308 (N.B. App. Div.); Re Atlantic Sugar Refineries Ltd., and Bakery and Confectionary Workers International Union of America, Local 443 (1960), 27 D.L.R. (2d) 310 (N.B. App. Div.).

Newfoundland: Daley et al. v. Royle Excavating Co. Ltd. et al. (1961), 28 D.L.R. (2d) 514; Bakery and Confectionary Workers' International Union of America, Local 381 v. Mammy's Ltd. et al. (1965), 54 D.L.R. (2d) 90.

Nova Scotia: Re Canadian Gypsum Co. Ltd. and Nova Scotia Quarryworkers Union Local 294 (1959), 20 D.L.R. (2d) 319 (N.S.S.C. en banc).

20. Re Pacific Western Airlines Ltd. and Pacific Western Airlines Pilots' Association (1959), 22 D.L.R. (2d) 500; Shipping Federation of British Columbia, and International Longshoremen's and Warehousemen's Union, Local 501 (1960), 60 CLLC para. 15,277; Re

Shipping Federation of British Columbia, and International Longshoremen's and Warehousemen's Union, (1961), 31 D.L.R. (2d) 181; Re Canadian Air Line Pilots Association, and Pacific Western Airlines Ltd.; ex parte Bray et al. (1963), 40 D.L.R. (2d) 125.

21. 54 D.L.R. (2d) 210 (Ont. C.A.)

22. in Re Oil, Chemical and Atomic Workers' International Union, Local 9-14, and Polymer Corporation Ltd. (1966), 55 D.L.R. (2d) 198.

23. in Re Hudson Bay Mining and Smelting Co. Ltd. and Flin Flon Base Metal Workers' Federal Union No. 172 (1966), 60 D.L.R. (2d) 312. Upon appeal, the Court of Appeal for Manitoba did not explicitly state its agreement with the judge below on the point, but approved his conclusion that the applicant might invoke the rules of court for this purpose: (1967), 61 D.L.R. (2d) 429 (Man. C.A.). Upon further appeal to the Supreme Court of Canada, the point was not mentioned: (1967), 66 D.L.R. (2d) 1 (S.C.C.).

24. 2 D.L.R. (2d) 700 (Ont. C.A.)

25. [1964] R.P. 211; 66 CLLC 333

26. [1964] S.C. 1; 64(3) CLLC 84

27. Regarding The Alberta Labour Act: Re Ewaschuk, Western Plywood (Alberta) Ltd. v. International Woodworkers of America, Local 1-207 (1964), 44 D.L.R. (2d) 700 (Alta.).

Regarding the Labour Relations Act (British Columbia): Howe Sound Company v. International Union of Mine, Mill and Smelter Workers (Canada), Local 663 (1961), 29 D.L.R. (2d) 76 (B.C.C.A.) aff'd [1962] S.C.R. 318.

Regarding the Labour Relations Act (New Brunswick): Re Atlantic Sugar Refineries Ltd. and Bakery and Confectionary Workers' International Union of America, Local 443 (1960), 27 D.L.R. (2d) 310 (N.B. App. Div.).

Regarding the Canada Act: Re Oil, Chemical and Atomic Workers' International Union, Local 9-14, and Polymer Corporation Ltd. (1966), 55 D.L.R. (2d) 198 (Ont. H. C.); Re Hudson Bay Mining and Smelting Co. Ltd.

and Flin Flon Base Metal Workers' Federal Union, No. 172 (1966), 60 D.L.R. (2d) 312 (Man. Q.B.) (point not mentioned on further appeals to Court of Appeal for Manitoba, 61 D.L.R. (2d) 429, and to Supreme Court of Canada, 66 D.L.R. (2d) 1); Regina v. O'Connell et al.; ex parte Cumberland Railway Co. (1967), 64 D.L.R. (2d) 97 (N.S.), aff'd (1968), 67 D.L.R. (2d) 135 (N.S. App. Div.) sub nom. Regina v. Board of Arbitration; ex parte Cumberland Railway Co.

28. [1962] S.C.R. 318

29. 60 D.L.R. (2d) 312 (Man. Q.B.). In Regina v. Board of Arbitration; ex parte Cumberland Railway Co., op. cit. footnote 27, after denying that an award of arbitrators subject to the Canada Act might be reviewed on certiorari, the Nova Scotia Appeal Division reviewed the award but did not discuss the alternative procedure invoked by the appellant.

30. Manitoba Queen's Bench Rules 536 and 537 (virtually identical to Rules 611 and 612 of the Supreme Court of Ontario Rules of Procedure) were invoked. These rules read as follows:

> 536. Where the rights of any person depend on the construction of any statute, by-law, deed, will, or other instrument, he may apply by way of originating notice, on notice to all parties concerned, to have his rights declared and determined.
>
> 537. (1) Where the rights of the parties depend:
>
> (a) on the construction of any contract or agreement and there are no material facts in dispute; or
>
> (b) on undisputed facts and the proper inference from such facts,
>
> such rights may be determined on originating notice.
>
> (2) A contract or agreement may be construed before there has been a breach thereof.

In Re Oil Chemical & Atomic Workers International Union, Local 9-14 and Polymer Corporation Ltd. (1966), 55 D.L.R. (2d) 198 (Ont. H.C.), the court denied that Ontario Rules 611 and 612 could be invoked to secure a declaration that arbitrators subject to the Canada Act had power to order production of documents and to issue subpoenas.

31. 61 D.L.R. (2d) 429, at p. 436 (Man. C.A.)

32. 52 D.L.R. (2d) 337 (B.C.), aff'd (1966), 57 D.L.R. (2d) 417 (B.C.C.A.)

33. The relevant sections of the Arbitration Acts are set out in footnote 18, above.

34. section 73(15)(17)

35. under rules of court similar to Manitoba Queen's Bench Rule 539 and Rule 613 of the Supreme Court of Ontario Rules of Procedure.

36. Re Civic Employees' Union No. 43 and Municipality of Metropolitan Toronto (1962), 34 D.L.R. (2d) 711 (Ont. C.A.)

37. See footnote 18, above.

38. section 73(17)(e)(i)

39. see Regina v. Weiler et al.; ex parte Hoar Transport Co. Ltd. (1967), 64 D.L.R. (2d) 400 (Ont. H.C.), rev'd (1968), 67 D.L.R. (2d) 484 (Ont. C.A.); Regina v. Weiler et al.; ex parte Union Carbide Canada Ltd. (1967), 65 D.L.R. (2d) 417 (Ont. C.A.).

40. 67 D.L.R. (2d) 484 (Ont. C.A.)

41. 64 D.L.R. (2d) 400 (Ont. H.C.)

42. 27 D.L.R. (2d) 310 (N.B. App. Div.)

43. 363 U.S. 564

44. 363 U.S. 574

45. Summers, Judicial Review of Labor Arbitration (1952), 2 UNIV. OF BUFFALO L. REV. 1

46. 25 D.L.R. (2d) 308 (N.B. App. Div.)

47. [1962] S.C.R. 318

48. 29 D.L.R. (2d) 76 (B.C.C.A.)

49. [1962] S.C.R. 318, at p. 328

50 65 D.L.R. (2d) 417 (Ont. C.A.)

51. 18 L.A.C. 74

52 Atlantic Sugar and Union Carbide may be contrasted with the result in Re Sandwich, Windsor and Amhurstberg Ry. et al. (1960), 26 D.L.R. (2d) 704 (Ont. C.A.), where the judge of first instance and the Court of Appeal for Ontario were unanimously of the opinion that, in the absence of contrary indication in the collective agreement, compulsory retirement of employees at a given age is a function of management. While the attack on the award was put and decided verbally on

other grounds, the courts in effect determined that the disputed matter was not arbitrable. From the point of view expressed in Atlantic Sugar, the courts really decided issues identical to those before the arbitrators. From the point of view expressed in Union Carbide, the arbitrators' determination of arbitrability should have been conclusive.

53. section 73(15)(b), (17)(c)(d)

54. 65 CLLC 119 (B.C.)

55. 63 D.L.R. (2d) 376 (Ont. C.A.)

56. 65 D.L.R. (2d) 641 (S.C.C.)

57. 62 D.L.R. (2d) 167 (Ont. C.A.)

58. Prepared for the Task Force on Labour Relations, Project 38B (Part 2), pages 33-36; 45-46.

59. 52 D.L.R. (2d) 337 (B.C.), aff'd (1966), 57 D.L.R. (2d) 417 (B.C.C.A.)

60. 47 W.W.R. 544 (Alta.)

61. including CARROTHERS, LABOUR ARBITRATION IN CANADA (1961), and the Labour Arbitration Cases.

62. op. cit., footnote 58, pages 51-53

63. 6 D.L.R. (2d) 156 (B.C.)

64. 67 D.L.R. (2d) 135 (N.S. App. Div.)

65. [1955] S.C.R. 3, at p. 6-7

66. 4 D.L.R. (2d) 98 (B.C.)

67. 27 D.L.R. (2d) 54 (Man.)

68. When review of arbitration subject to The Labour Relations Act (Ontario) is sought, it may be possible, despite the statutory exclusion of the Arbitrations Act, for the applicant to use Rules 611-612 of the Supreme Court of Ontario Rules of Practice to invoke the court's inherent jurisdiction. In this event, presumably the scope of review would be the same as arbitrations falling into the first class. If The Rights of Labour Act, R.S.O. 1960, c. 354, section 3(2) does not bar certiorari applications to quash arbitration awards, it should not bar this procedure either.

69. The doctrine has been outlined in the following cases which are cited repeatedly by Canadian courts on review of labour arbitrations: Attorney-General for Manitoba v. Kelly, [1922] 1 A.C. 268, at pages 275, 276, 281, 283 (J.C.); Government of Kelantan v. Duff Development Company Limited, [1923] A.C. 395,

at p. 409 (Viscount Cave), 418 (Lord Parmoor); F. R. Absalom, Limited v. Great Western (London) Garden Village Society, Limited, [1933] A.C. 592, at p. 610 (Lord Russell of Killowen), 616 (Lord Wright); Faubert and Watts v. Temagami Mining Co. Ltd., [1960] S.C.R. 235, at p. 241.

For examples of application of this doctrine to labour arbitrations subject to the various labour relations statutes, see the following:

Alberta: Re Ewaschuk, Western Plywood (Alberta) Ltd. v. International Woodworkers of America, Local 1-207 (1964), 44 D.L.R. (2d) 700.

British Columbia: Re Woods; W. H. Malkin Co. Ltd. v. Retail, Wholesale & Department Store Union, Local 580 (1959), 20 D.L.R. (2d) 776; Re the Bay Company (B.C.) and Local 170 of the Pipefitting Industry (1960), 24 D.L.R. (2d) 582; Re Columbia Meat Packing Co. Ltd. and Amalgamated Meat Cutters and Butcher Workmen of North America, Local 212 (1961), 31 D.L.R. (2d) 102; A.B.C. Sheet Metal & Plumbing Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 170 (1961), 31 D.L.R. (2d) 147

(B.C.C.A.); Re Peterson Electrical Construction Co. Ltd. and International Brotherhood of Electrical Workers Locals 213 and 230 (1962), 32 D.L.R. 592; Duthie v. Firnie Memorial Hospital Society (1964), 43 D.L.R. (2d) 477 (B.C.C.A.); Re International Union of Operating Engineers, Local 115 v. Ben Ginter Construction Co. Ltd. (1966), 66 CLLC 618.

Newfoundland: Bakery and Confectionary Workers' International Union of America, Local 381 v. Mammy's Ltd. et al. (1965), 54 D.L.R. (2d) 90.

Nova Scotia: Re Canadian Gypsum Co. Ltd. and Nova Scotia Quarryworkers' Union, Local 294 (1959), 20 D.L.R. (2d) 319 (N.S.S.C. en banc)

Canada: Shipping Federation of British Columbia, and International Longshoremen's and Warehousemen's Union, Local 501 (1960), 60 CLLC para. 15,277 (B.C.); Re Shipping Federation of British Columbia, and International Longshoremen's and Warehousemen's Union, Locals 501 etc. (1962), 33 D.L.R. (2d) 157 (B.C.); Regina v. Norton et al.; ex parte International Brotherhood of Teamsters (1963), 40 D.L.R. (2d) 1060 (Man.).

70. These reasons are stated explicitly or implicitly in Hodgkinson v. Fernie (1857), 27 L.J.C.P. 66, at p. 68, 69 (quoted by the Court of Appeal for Ontario in Regina v. Barber et al.; ex parte Warehousemen and Miscellaneous Drivers' Union, Local 419 (1968), 68 CLLC para. 14,098); Attorney-General for Manitoba v. Kelly, [1922], A.C. 275, at p. 276 (H.C.); Government of Kelantan v. Duff Development Company Limited, [1923] A.C. 395, at p. 421 (Lord Trevethin); F. R. Absalom, Limited v. Great Western (London) Garden Village Society, Limited, [1933] A.C. 592, at p. 608.

71. Alberta, section 73(5): "...all differences between the parties...bound by the collective agreement...concerning its interpretation, application, operation or any alleged violation, including any question as to whether the differences are arbitrable..."

British Columbia, section 22(1): "...all differences between the persons bound by the agreement concerning its interpretation, application, operation, or any alleged violation thereof, including any question as to whether any matter is arbitrable..."

Manitoba, section 19(1): "...all differences between the parties concerning its meaning, application or violation..."

New Brunswick, section 18(1): "...all differences between the parties...bound by the agreement...concerning its meaning or violation..."

Newfoundland, section 19(1): "...all differences between the parties...bound by the agreement...where those differences arise out of the interpretation, application, administration or alleged violation of the agreement and including any question as to whether a matter is arbitrable."

Nova Scotia, section 19(1): "...all differences between the parties...bound by the agreement...concerning its meaning or violation..."

Ontario, section 34(1): "...all differences between the parties arising from the interpretation, application, administration, or alleged violation of the agreement, including any question as to whether a matter is arbitrable..."

Quebec, section 88: "...every grievance shall be submitted to arbitration..."

Prince Edward Island, section 23(1): "...all differences between the parties...bound by the agreement...concerning its meaning or violation..."

Canada, section 19(1): "...all differences between the parties...bound by the agreement...concerning its meaning and violation."

72. Alberta, section 73(6); Manitoba, section 19(2); Newfoundland, section 19(2); Ontario, section 34(2). See also Quebec, section 88 which simply orders arbitration if the parties have not provided for it in the collective agreement.

73. Canada, section 19(2); British Columbia, section 22(2); New Brunswick, section 18(2); Nova Scotia, section 19(2); Prince Edward Island, section 23(2).

74. See F. R. Absalom, Limited v. Great Western (London) Garden Village Society, Limited, [1933] A.C. 593, at p. 608 (Lord Russel), p. 616 (Lord Wright).

75. op. cit. footnote 58, page 23-24

76. 28 D.L.R. (2d) 514 (Newf.)

77. 62 D.L.R. (2d) 156, at p. 161-162, aff'd (1968) unreported (Ont. C.A.) (reproduced as Appendix B to this Report)

78. 68 CLLC para. 14,098, at p. 11,533 (Ont. C.A.). Of course Ontario courts can afford to take a less formalistic view without any sacrifice: upon review by certiorari, the Court of Appeal for Ontario in Barber held that

the court may review all determinations of "law" by the arbitrator, even within the scope of issues specifically referred to him. This will be discussed in more detail below.

79. 60 CLLC para. 15,277 (B.C.)

80. 31 D.L.R. (2d) 102 (B.C.)

81. 31 D.L.R. (2d) 463 (B.C.)

82. 35 D.L.R. (2d) 433 (B.C.)

83. 44 D.L.R. (2d) 199 (Ont. H.C.)

84. 65 CLLC 241 (B.C.)

85. 66 CLLC 618 (B.C.)

86. 54 D.L.R. (2d) 90 (Newf.)

87. see HART & SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (1958), pages 374-383.

88. 2 D.L.R. (2d) 700 (Ont. C.A.)

89. McRuer, C.J.H.C. in Re Canadian Westinghouse Co. Ltd. and United Electrical, Radio & Machine Workers of America, Local 504 (1961), 30 D.L.R. (2d) 676; and Jessup, J. in Regina v. Bigelow et al.; ex parte

Sefton (1965), 50 D.L.R. (2d) 38

90. 68 CLLC para. 14,098 (Ont. C.A.)

91. 30 D.L.R. (2d) 673 (Ont. C.A.)

92. 35 D.L.R. (2d) 371 (Ont. C.A.)

93. 68 CLLC para. 14,098 (Ont. C.A.)

94. 19 D.L.R. (2d) 380 (Ont. C.A.)

95. [1968] 1 O.R. 447 (H.C.J.)

96. 68 CLLC para. 14,098

97. [1962] S.C.R. 318

98. 66 D.L.R. (2d) 1 (S.C.C.)

99. 60 D.L.R. (2d) 312, rev'd 61 D.L.R. (2d) 429 (Man. C.A.) sub nom. Re Hudson Bay Mining & Smelting Co. Ltd. and Flin Flon Base Metal Workers' Federal Union No. 172 et al.

100. 22 D.L.R. (2d) 500 (B.C.)

101. 32 W.W.R. (N.S.) 390 (B.C.)

102. 34 D.L.R. (2d) 711 (Ont. C.A.)

103. 40 D.L.R. (2d) 125 (B.C.)

104. 46 W.W.R. (N.S.) 593 (B.C.)

105. 65 CLLC 200 (B.C.)

106. 68 CLLC para. 14,098 (Ont. C.A.)

107. section 34(7)(c)

108. 34 W.W.R. (N.S.) 525 (B.C.)

109. 75 D.L.R. (2d) 28 Ont. H.C.)

110. 62 D.L.R. (2d) 485 (B.C.)

111. 20 D.L.R. (2d) 319 (N.S.S.C. en banc)

112. unreported to date. The reasons for judgment of the Court of Appeal for Ontario are reproduced in Appendix B to this Report.

113. [illegible] D.L.R. (2d) [illegible] (Ont. C.A.)

114. 60 CLLC para. 15,277

115. 26 D.L.R. (2d) 609, aff'd (1961), 28 D.L.R. (2d) 81 (C.A.), aff'd [1962] S.C.R. 338 sub nom. Imbleau et al. v. Laskin et al.

116. 62 D.L.R. (2d) 156 (H.C.J.), aff'd (1968) unreported (Ont. C.A.), reproduced in Appendix B.

117. Section 39(3) reads: A collective agreement shall not be

terminated by the parties before it ceases to operate in accordance with its provisions or this Act without the consent of the Board on the joint application of the parties.

118. 66 CLLC 571 (Ont. H.C.), aff'd 66 CLLC 601 (Ont. C.A.)

119. R.S.O. 1960, c. 181 (as amended)

120. Re Polymer Corporation, and Oil, Chemical and Atomic Workers' Union, Local 16-14 (1961), op. cit., footnote 115.

121. 60 D.L.R. (2d) 214 (Ont. H.C.), rev'd (1967), 62 D.L.R. (2d) 342 (Ont. C.A.), appeal pending in the Supreme Court of Canada.

122. 62 D.L.R. (2d) 342, at p. 355-356

123. 62 D.L.R. (2d) 342, at p. 365-366

124. 50 D.L.R. (2d) 84 (Sask.)

125. 44 D.L.R. (2d) 463 (B.C.)

126. [1962] Que. Q.B. 381, aff'd [1964] S.C.R. 45

127. 49 Stat. 449, 29 U.S.C.A., sections 141 f.f.

128. 61 Stat. 154, Public Law 101, 80th Congress, 1st Sess.

129. section 201(b)

130. section 203(d)

131. section 301(a)

132. United Steelworkers of America v. American Manufacturing Co. (1960), 363 U.S. 564; United Steelworkers of America v. Warrior & Gulf Navigation Co. (1960), 363 U.S. 574; United Steelworkers of America v. Enterprise Wheel & Car Corp. (1960), 363 U.S. 593.

133. Cox, Current Problems in the Law of Grievance Arbitration (1958), 30 ROCKY MT. LAW REV. 247, at p. 261, quoted in American Manufacturing Co., 363 U.S. 564, at p. 568; Cox, Reflections Upon Labour Arbitration (1959), 72 HARV. L. REV. 1482, at pages 1498-1499, 1508-1509 quoted and cited in Warrior & Gulf Co., 363 U.S. 574, at pages 579-580.

134. Shulman, Reason, Contract and Law in Labour Relations (1955), 68 HARV. L. REV. 999 at pages 1004-1005, 1016, quoted and cited in Warrior & Gulf Co., 363 U.S. 574, at pages 578-579, 580, 581.

135. United Steelworkers of America v. Warrior & Gulf Navigation Co. (1960), 363 U.S. 574, at p. 578-579, 580-581

136. Ibid., at p. 581

137. Ibid, at p. 578

138. Ibid., at p. 581-582

139. United Steelworkers of America v. Enterprise Wheel & Car Corp. (1960), 363 U.S. 593, at p. 597

140. section 34

141. [1955] S.C.R. 3. See pages 21-22, above.

142. The suggested procedure is similar to that authorized in the Supreme Court of Ontario when a litigant objects to the result of a party-and-party taxation. See Supreme Court of Ontario Rules of Practice, Rules 688-689. It is also similar to procedure recommended for voluntary inclusion in collective agreements in the United States by Jones, Arbitration and the Dilemma of Possible Error (1960), 11 LAB. ARB. JO. 1023, at p. 1026.

The survey conducted by Professors Jones and Smith revealed that few parties to collective agreements in the U.S.A. had established any internal review procedure. However, they reported that the agreements between Allis-Chalmers Manufacturing Company and its various UAW locals contain detailed provisions for the impartial referee to reconsider his decision upon request of either party. The collective agreements between locals of the Pressmen's Union and

employers provide for an appeal from arbitrators to an International Board of Arbitration, composed of three members of the Board of Directors of the Pressmen's Union, three members of the Special Standing Committee of the American Newspaper Publishers Association, and a seventh neutral member chosen from a pre-selected panel of impartial arbitrators. Jones and Smith, Management and Labor Appraisals and Criticisms of the Arbitration Process: A Report with Comments (1964), 62 MICH. L. REV. 1115, at pages 1124-1125.

143. Metropolitan Railway Co. v. Wright (1886), 11 App. Cas. 152 (H.L.); Canadian National Railways v. Muller, [1934] 1 D.L.R. 768 (S.C.C.); McConnell v. McLean, [1937] S.C.R. 341

144. Powell v. Streathem Manor Nursing Home, [1935] A.C. 250; Watt or Thomas v. Thomas, [1947] A.C. 484; Radcliffe et al. v. Rennie et al., [1965] S.C.R. 70

145. The Directors etc. of the Metropolitan Ry. Co. v. Jackson (1887), 3 App. Cas. 193 (H.L.)

146. The recommendation here parallels the argument of George Taylor that determination of grievances arising under contract clauses which do not manifest the parties'

agreement or clear intention "inherently requires the exercise of an industrial relations judgment not inconsistent with the terms of the agreement". Taylor, Further Remarks on Grievance Arbitration (1949), 4 ARB. JO. 92, at p. 96. See also the statement by the United States Supreme Court concerning the limit of arbitrators' interpretive power in United Steelworkers of America v. Enterprise Wheel & Car Corp. (1960), 363 U.S. 593, at p. 597, set out at page 58 above.

APPENDIX "A"

Provisions in labour relations statutes directing inclusion in collective agreements of contract dispute settlement machinery, and provisions prohibiting strikes and lockouts during term of the collective agreement.

* * * *

THE ALBERTA LABOUR ACT

Section 73(1)...

...

(5) Every collective agreement entered into after this subsection comes into force shall contain a provision for final settlement by arbitration or such other method as may be agreed upon by the parties of all differences between the parties or persons bound by the collective agreement or on whose behalf it was entered into concerning its interpretation, application, operation or any alleged violation thereof including any question as to whether the differences are arbitrable without stoppage of work or refusal to perform work.

(6) Where a collective agreement, whether entered into before or after this subsection comes into force, does not contain a provision as required in subsection (5) it shall be deemed to contain the following provisions:

(a) If any differences concerning the interpretation, application, operation, or any alleged violation of this agreement arise

or any question as to whether any difference is arbitrable arises between the parties or persons bound by the collective agreement or on whose behalf it was entered into, the representatives of the employer and of the union shall meet and endeavour to resolve the difference.

(b) If the parties are unable to resolve the difference either of the parties may

(i) after exhausting the procedure set out in the preceding paragraph, or

(ii) where either party fails to follow the procedure set out in the preceding paragraph to its conclusion,

notify the other party in writing of its desire to submit the difference to arbitration and the notice shall contain a statement of the difference and the name of the first party's appointee to an arbitration board. The recipient of the notice shall within five days, exclusive of Saturdays and Sundays and other holidays, inform the other party of the name of its appointee to the arbitration board. The two appointees so selected shall within five days, exclusive of Saturdays and Sundays and other holidays, of the appointment of the second of them, appoint a third person who shall be the chairman.

If the recipient of the notice fails to appoint an arbitrator within the time limited, the appointment shall be made by the Board of Industrial Relations upon the request of either party where the Board decides the difference is arbitrable. If the two appointees fail to agree upon a chairman within the time limited, the appointment shall be made by the Minister of Labour upon the request of either party.

The arbitration board shall hear and determine the difference and shall issue an award in writing and the decision is final and binding upon the parties and upon any employee affected by it. The award of a majority is the award of the arbitration board, but if there is no majority the decision of the chairman governs and shall be deemed to be the award of the board.

Each party to the difference shall bear the expenses of its respective appointee to the grievance board and the two parties shall bear equally the expenses of the chairman.

The arbitration board by its decision shall not alter, amend or change the terms of this collective agreement.

(7) Where the provision required or prescribed under this section provides for the appointment of a board of arbitration or other body,

(a) if either party to the collective agreement within five days, exclusive of Saturdays and Sundays and other holidays, of the written notice from the other party of the appointment of his member or members fails or neglects to appoint a member or members, the Board may upon the request of the other party, where the Board decides the difference is arbitrable, appoint a person or persons it considers fit for such purpose, and such person or persons is or are deemed to be appointed by that party,

(b) if the appointed members within five days, exclusive of Saturdays and Sundays and other holidays, from the date of the appointment of the last appointed member, fail to agree upon a person to act as chairman, the Minister shall appoint a chairman upon the request of either party, and

(c) if either member of the arbitration board, or the chairman thereof, refuses to act, or is incapable of acting, or dies, a new member or chairman may be appointed in the same manner as provided for the appointment of the member or chairman,

except that with the consent of both parties, the time

within which any of the appointments shall be made may be extended for such time as is agreed to by the parties.

(8) Unless otherwise provided in a collective agreement,

(a) any person is eligible to be appointed to a position, other than as chairman on an arbitration board, but

(b) no person shall be appointed as an arbitrator who is directly affected by the matter before the arbitration board or who has been involved in an attempt to negotiate or settle such matter.

(9) Where a difference has been submitted to arbitration under this section and one of the parties to the arbitration complains to the Board that the arbitrator or the arbitration board, as the case may be, has failed to render an award within a reasonable time, the Board may, after consulting the parties and the arbitrator or the arbitration board, issue whatever order it considers necessary in the circumstances to ensure that an award will be rendered in the matter without further undue delay.

(10) The arbitrator or the chairman of the arbitration board, as the case may be, has power

(a) to summon and enforce the attendance of witnesses and to compel them to give evidence in

the same manner as a court of record in civil cases, and do all other things which during the proceedings the arbitrator or arbitration board may require,

(b) to administer oaths and take affirmations of witnesses,

(c) to enter any premises where work is being done or has been done by the employees or in which the employer carries on business or where anything is taking place or has taken place concerning any of the differences submitted to him or it, and inspect and view any work, material, machinery, appliance or article therein, and interrogate any person under oath in the presence of the parties or their representatives respecting any such thing or any of such differences,

(d) to authorize any person to do any thing that the arbitrator or arbitration board may do under clause (c) and to report to the arbitrator or the arbitration board thereon, and

(e) to correct in any award any clerical mistake, error or omission.

(11) The award of an arbitrator or of an arbitration board is binding

(a) upon the parties,

(b) in the case of a collective agreement between a bargaining agent and an employers' organization, upon the employers covered by the agreement who are affected by the awards, and

(c) upon the employees covered by the agreement who are affected by the award, and those parties, employers, bargaining agents, and employees shall do or abstain from doing any thing required of them by the award.

(12) An arbitration board by its award shall not alter, amend or change the terms of a collective agreement, and shall forthwith upon making the award, file a copy thereof with the board.

(13) Where a party, employer, bargaining agent or employee has failed to comply with any of the terms of the award of an arbitrator or arbitration board a party, employer, bargaining agent or employee affected by the award may apply to the Court at any time after the expiration of fourteen days from the date of service of the award of the arbitrator or arbitration board upon the parties affected by it or the date provided in the award for compliance, whichever is later, by way of a notice of motion upon seven clear days' notice to all

parties affected by the award for either an order confirming the award and declaring that it be entered as a judgment of the Court or for an order setting the award aside.

(14) Where it appears upon an application being made for an order confirming the award that the application is unopposed the judge hearing the application shall confirm the award and declare that it be entered as a judgment of the Court.

(15) Where an application for an order confirming the award is opposed, or where an application is made to have the award set aside, the judge may set the award aside where

(a) an arbitrator has misconducted himself or the proceedings, or the arbitration or award has been improperly procured, or

(b) the judge is of the opinion that a question was not arbitrable, but the arbitrator, arbitration board, or Board, decided the question was arbitrable and an award was made determining such question, or

(c) an arbitration board has made an error in law appearing on the face of the award regardless of whether the question of law was submitted to be determined by the arbitrator or arbitration board.

(16) Where an award is confirmed and entered as a judgment of the Court it is enforceable as such.

(17) Where:

(a) an arbitrator has misconducted himself or the proceedings, the Court may remove him;

(b) an arbitrator has misconducted himself or the proceedings, or an arbitration or award has been improperly procured, the Court may set the award aside;

(c) an arbitrator or an arbitration board or the Board has decided that a question is arbitrable and an award was made by an arbitrator or arbitration board determining such question, the Court may set the award aside if in the opinion of the Court the question was not arbitrable;

(d) an arbitrator or arbitration board or the Board has decided that a question is not arbitrable, the Court may if in its opinion the question was arbitrable order the question to be tried by an arbitrator or arbitration board;

(e) an arbitrator or arbitration board so desires and where so directed by the Court he or it shall state

(i) any question of law arising in the course of the arbitration, or

(ii) an award or any part of an award

in the form of a special case for the decision of the Court.

(18) The Arbitration Act does not apply to arbitrations under collective agreements.

Section 94(1)...

...

(4) Notwithstanding anything contained in subsection (1),

(a) no trade union, no officer or representative of a trade union and no person acting or representing himself to be acting on behalf of a trade union shall authorize or call a strike, and

(b) no employee shall go on strike,

until a vote has taken place under the supervision of the Board in the manner provided for in section 69 and a majority of the employees entitled to vote have voted in favour of the strike.

(5) Where the majority of employees have voted in favour of a strike, no employee shall go on strike

until the employer has been given written notice by the bargaining agent that the employees are going on strike and not less than two working days have elapsed from the time such notice was given.

(6) Notwithstanding subsection (1), no employer shall cause a lock-out until the bargaining agent has been given written notice by the employer that the employees will be locked out and not less than two working days have elapsed from the time such notice was given.

LABOUR RELATIONS ACT (BRITISH COLUMBIA)

Section 22(1) Every collective agreement shall contain a provision

(a) governing the dismissal or suspension of an employee bound by the agreement; and

(b) for final and conclusive settlement without stoppage of work, by arbitration or such other method as may be agreed to by the parties, of all differences between the persons bound by the agreement concerning its interpretation, application, operation, or any alleged violation thereof, including any question as to whether any matter is arbitrable.

(2) Where a collective agreement, whether entered into

before or after the commencement of this Act, does not contain a provision as required by this section, the Minister shall by order prescribe a provision for such purpose, and a provision so prescribed shall be deemed to be a term of the collective agreement and binding on all persons bound by the agreement.

(3) Where the provision required or prescribed under this section provides for the appointment of a board of arbitration or other body,

(a) if either party to the collective agreement within five days of the written notice from the other party of the appointment of his member or members fails or neglects to appoint a member or members, the Labour Relations Board may, if in its opinion the question is arbitrable, appoint a person or persons it deems fit for such purpose, and such person or persons is or are deemed to be appointed by the said party; and

(b) if the appointed members, within five days from the date of the appointment of the last appointed member, fail to agree upon a person to act as Chairman, and any one of the members has been appointed under clause (a), the Minister may appoint a Chairman.

(4) Notwithstanding the provision required or prescribed under this section,

(a) if, at any time prior to the appointment of a board of arbitration or other body, either party to the collective agreement requests the Registrar in writing to appoint an officer of the Department of Labour to confer with the parties to assist them to settle the difference, and where the request is accompanied by a statement of the difference to be settled, the Registrar may

(i) appoint an officer to confer with the parties; or

(ii) refer the difference to the Board;

(b) where an officer is appointed under clause (a), the officer shall, after conferring with the parties, make a report to the Registrar, which report may be referred to the Board;

(c) where the difference is referred to the Board under clause (a), or the report of the officer is referred to the Board under clause (b), the Board may, if in its opinion the difference is arbitrable,

(i) refer the difference back to the parties; or

(ii) inquire into the difference and, after such inquiry as the Board considers adequate,

make an order for final and conclusive settlement of the difference;

(d) where the Board refers the difference to the parties under clause (c), the parties shall follow the procedure in the provision required or prescribed under subsection (1) or (2), as the case may be, for final and conclusive settlement of the difference;

(e) where the Board

(i) inquires into the difference under clause (c); or

(ii) advises the parties that in its opinion the difference is not arbitrable, neither the Arbitration Act nor any other procedure for settlement of the difference shall apply;

(f) the order of the Board for final and conclusive settlement of the difference is final and binding on the parties and all other persons bound by the collective agreement, and such parties and persons shall comply with the order;

(g) if, after service of the order, and after the expiration of fourteen days from the date of the order or the date provided in the order for

compliance, whichever is the later, the employer, trade-union, or other person fails to comply with the order, and the employer, trade-union, or other person affected by the order notifies the Board of the failure, the Board shall file in the office of the Registrar of the Supreme Court a copy of the order, and thereupon the order is enforceable as a judgment or order of that Court.

(5) Where under this section a board of arbitration, the Board, or other body finds that an employee has been dismissed or suspended for other than proper cause, the board of arbitration, the Board, or other body may

(a) direct the employer to reinstate the employee and pay to the employee a sum equal to his wages lost by reason of his dismissal or suspension, or such lesser sum as in the opinion of the board of arbitration, the Board, or other body, as the case may be, is fair and reasonable; or

(b) make such order as it considers fair and reasonable, having regard to the terms of the collective agreement.

(6) Parties to a collective agreement may at any time by written agreement specifically exclude the operation of subsection (4), and in that event subsection (4) shall not apply during the term of the collective agreement.

Section 46(1) No employer bound by collective agreement, whether entered into before or after the commencement of the Act, shall, during the term of the collective agreement, lock out any employee bound by the collective agreement.

(2) No employees bound by a collective agreement, whether entered into before or after the commencement of this Act, shall strike during the term of the collective agreement, and no person shall declare or authorize a strike of such employees.

THE LABOUR RELATIONS ACT (MANITOBA)

Section 19(1) Every collective agreement entered into after the twenty-first day of April, 1948, shall contain a provision for final settlement without stoppage of work, by arbitration or otherwise, of all differences between the parties to, or persons bound by, the agreement or on whose behalf it was entered into, concerning its meaning, application, or violation.

(2) Where a collective agreement, whether entered into before or after the coming into force of the Revised Statutes, does not contain a provision as required under subsection (1), it shall be deemed to

contain the following provision as subsections of a section, or as separate sections, of the agreement, or as may be required:

Where a violation of this agreement is alleged, or a difference between the parties to this agreement relating to the meaning or application of the agreement (including a difference relating to whether or not a matter upon which arbitration has been sought comes within the scope of the agreement), arises, a party thereto, after exhausting any grievance procedure established by this agreement, may notify the other party in writing of its desire to submit the alleged violation or difference to arbitration; and the notice shall contain the name of the person appointed to the arbitration board by the party giving the notice.

The party to whom notice is given shall, within five days of receiving the notice, name the person whom it appoints to the arbitration board and shall advise the party giving the notice of the name of its appointee.

No person who has a pecuniary interest in a matter before the arbitration board, or who is acting or has, within a period of one year prior to the date on which notice of desire to submit the matter to arbitration is given, acted as solicitor, counsel, or agent of any of the parties to the arbitration, is

eligible for appointment as a member of the arbitration board or shall act as a member of the arbitration board.

The two appointees named by the parties to the agreement, within five days of the appointment of the second of them, shall appoint a third member of the arbitration board who shall be the chairman thereof.

Where the party receiving the notice fails to appoint a member of the arbitration board, or where the two appointees of the parties fail to agree on the appointment of a third member of the arbitration board, within the time specified, the Minister of Labour, upon the request of a party to the agreement, shall appoint a member on behalf of the party failing to make an appointment, or shall appoint the third member, as the case may be, and, where the case requires, shall appoint both.

The arbitration board shall hear relevant evidence adduced relating to the alleged violation or difference, and argument thereon by the parties or by counsel on behalf of either or both of them, and shall make a decision thereon which shall be binding on the parties and upon any person on whose behalf the agreement was made.

The decision of the majority of the members of an arbitration board shall be the decision of the arbitration board; and if there is no majority decision, the

decision of the chairman shall be the decision of the arbitration board.

(2A) Where, in the opinion of the board, any part of the arbitration provisions in a collective bargaining agreement, including the method of appointment of the arbitrator or arbitration board, is inadequate, or the provisions set out in subsection (2) are unsuitable in any particular case, the board, on the application of a party to the collective agreement, may modify any such provision in such manner as not to conflict with subsection (1); but, until so modified, the arbitration provisions in the collective agreement or in subsection (2), as the case may be, apply.

(3) Every party, and every person bound by, the agreement, and every person on whose behalf the agreement was entered into, shall comply with the provision for final settlement contained in the agreement and shall fulfil all his other obligations under the agreement.

(4) The Arbitration Act does not apply to an arbitration under a collective agreement.

Section 22(1) Except in respect of a dispute that is subject to subsection (2),

(a) no employer bound by, or who is a party to, a collective agreement, whether entered into before

or after the coming into force of the Revised Statutes, shall declare or cause a lockout with respect to an employee bound by the collective agreement or on whose behalf the collective agreement was entered into; and

(b) during the term of the collective agreement, no employee bound by a collective agreement or on whose behalf a collective agreement has been entered into, whether entered into before or after the coming into force of the Revised Statutes, shall go on strike; and no bargaining agent that is a party to the agreement shall declare or authorize a strike of any such employee.

(2) Where a collective agreement is in force and any dispute arises between the parties thereto with reference to the revision of a provision of the agreement that, by the provisions of the agreement, is subject to revision during the term of the agreement, the employer bound thereby or who is a party thereto shall not declare or cause a lockout with respect to an employee bound thereby or on whose behalf the collective agreement has been entered into; and no such employee shall strike, and no bargaining agent that is a party to the agreement shall declare or authorize a strike of any such employee, unless

(a) the bargaining agent of those employees and the employer or representatives authorized by them on their behalf have bargained collectively and have failed to conclude an agreement on the matters in dispute; and either

(b) a conciliation board or mediator has been appointed to endeavour to bring about agreement between them and seven days have elapsed from the date on which the report of the conciliation board or mediator was received by the minister; or

(c) either party has requested the minister in writing to appoint a conciliation board to endeavour to bring about agreement between them and seven days have elapsed since the minister received the request and

(i) no notice under subsection (2) of section 28 has been given by the minister, or

(ii) the minister has notified the party so requesting that he has decided not to appoint a conciliation board.

LABOUR RELATIONS ACT (NEW BRUNSWICK)

Section 18(1) Every collective agreement entered into after the commencement of this Act shall contain a provision

for final settlement, without stoppage of work, by arbitration or otherwise, of all differences between the parties to or persons bound by the agreement or on whose behalf it was entered into, concerning its meaning or violation.

(2) Where a collective agreement, whether entered into before or after the commencement of this Act, does not contain a provision as required by this section, the Board shall, upon application of either party to the agreement, by order prescribe a provision for such purpose and a provision so prescribed shall be deemed to be a term of the collective agreement and binding on the parties to and all persons bound by the agreement and all persons on whose behalf the agreement was entered into.

(3) Every party to and every person bound by the agreement and every person on whose behalf the agreement was entered into, shall comply with the provision for final settlement contained in the agreement and give effect thereto.

Section 21(1) Except in respect of a dispute that is subject to the provisions of subsection 2,

(a) no employer bound by or who is a party to a collective agreement, whether entered into before

or after the commencement of this Act, shall declare or cause a lockout with respect to any employee bound by the collective agreement or on whose behalf the collective agreement was entered into; and

(b) during the term of the collective agreement, no employee bound by a collective agreement or on whose behalf a collective agreement has been entered into, whether entered into before or after the commencement of this Act, shall go on strike and no bargaining agent that is a party to the agreement shall declare or authorize a strike of any such employee.

(2) Where a collective agreement is in force and dispute arises between the parties thereto with reference to the revision of a provision of the agreement that by the agreement is subject to revision during the term of the agreement, the employer bound thereby or who is a party thereto shall not declare or cause a lockout with respect to any employee bound thereby or on whose behalf the collective agreement has been entered into, and no such employee shall strike and no bargaining agent that is a party to the agreement shall declare or authorize a strike of any such employee until

(a) the bargaining agent of such employees and

the employer or representatives authorized by them on their behalf have bargained collectively and have failed to conclude an agreement on the matters in dispute; and either

(b) a Conciliation Board has been appointed to endeavour to bring about agreement between them and seven days have elapsed from the date on which the report of the Conciliation Board was received by the Minister; or

(c) either party has requested the Minister in writing to appoint a Conciliation Board to endeavour to bring about agreement between them and fifteen days have elapsed since the Minister received the said request; and

(i) no notice under subsection 2 of section 27 has been given by the Minister; or

(ii) the Minister has notified the party so requesting that he has decided not to appoint a Conciliation Board.

THE LABOUR RELATIONS ACT (NEWFOUNDLAND)

Section 19(1) Every collective agreement shall contain a provision for final settlement without stoppage of work, by arbitration or otherwise, of all differences

between the parties to or persons bound by the agreement or on whose behalf it was entered into, where those differences arise out of the interpretation, application, administration or alleged violation of the agreement and including any question as to whether a matter is arbitrable.

(2) If a collective agreement does not contain a provision required by subsection (1) it shall be deemed to contain the following provision:

> Where a difference arises between the parties to or the persons bound by this agreement or on whose behalf it has been entered into and where that difference arises out of the interpretation, application, administration or alleged violation of this agreement and including any question as to whether a matter is arbitrable, one of the parties may, after exhausting any grievance procedure established by this agreement, notify the other party in writing of its desire to submit the difference or allegation to arbitration and the notice shall contain the name of the person appointed to be an arbitrator by the party giving the notice.
>
> The party to whom notice is given shall within five days after receiving the notice name

the person whom it appoints to be an arbitrator and advise the party who gave the notice of the name of its appointee.

The two arbitrators named in accordance with this provision shall within five days after the appointment of the second of them name a third arbitrator and he shall be the chairman of the arbitration board.

If the party to whom notice is given fails to name an arbitrator within the period of five days after receiving the notice or if the two arbitrators named by the parties fail to agree upon the naming of the chairman within five days after the naming of the second arbitrator, the Minister of Labour of Newfoundland shall, on the request of either party, name an arbitrator on behalf of the party who failed to name an arbitrator or shall name the chairman, as the case may be, and, if the case so requires, the said Minister shall name the second arbitrator and the chairman. The arbitration board named under this provision shall hear relevant evidence adduced relating to the difference or allegation and argument thereon by the parties or counsel on behalf of either or both of them and make a decision on the difference or allegation and

the decision shall be final and binding upon the parties and upon any person on whose behalf this agreement was made. The decision of the majority of the members of an arbitration board named under this provision shall be the decision of the board and if there is no majority decision the decision of the chairman shall be the decision of the board.

Each party who is required to name a member of the arbitration board shall pay the remuneration and expenses of that member and the parties shall pay equally the renumeration and expenses of the chairman.

(3) If, in the opinion of the Board, any part of the provisions for final settlement in a collective agreement, including the provisions for the method of appointment of an arbitrator or arbitration board, is inadequate the Board may, on the written request of a party to the agreement, rule on the adequacy of those provisions and if the Board rules that those provisions are inadequate for the purposes of subsection (1) the provisions for final settlement in subsection (2) apply and shall be substituted for the provisions for final settlement contained in the agreement.

(4) Every party to and every person bound by a collective

agreement and every person on whose behalf the agreement was entered into shall comply with the provisions for final settlement contained in the agreement or in subsection (2) as the case may be and shall comply with any decision of an arbitrator or board of arbitrators appointed in accordance with those provisions and do or abstain from doing anything required by that decision.

Section 23(1) Except in respect of a dispute that is subject to the provisions of subsection (2),

(a) no employer bound by or who is a party to a collective agreement, whether entered into before or after the commencement of this Act, shall declare or cause a lockout with respect to any employee bound by the collective agreement or on whose behalf the collective agreement was entered into; and

(b) during the term of the collective agreement, no employee bound by a collective agreement or on whose behalf a collective agreement has been entered into, whether entered into before or after the commencement of this Act, shall go on strike and no bargaining agent that is a party to the agreement shall declare or authorize a strike of any such employee.

(2) Where a collective agreement is in force and any

dispute arises between the parties thereto with reference to the revision of a provision of the agreement that by the provisions of the agreement is subject to revision during the term of the agreement, the employer bound thereby or who is a party thereto shall not declare or cause a lockout with respect to any employee bound thereby or on whose behalf the collective agreement has been entered into, and no such employee shall strike and no bargaining agent that is a party to the agreement shall declare or authorize a strike of any such employee until

(a) the bargaining agent of such employees and the employer or representatives authorized by them on their behalf have bargained collectively and have failed to conclude an agreement on the matters in dispute; and either

(b) a conciliation board has been appointed to endeavour to bring about agreement between them and seven days have elapsed from the date on which the report of the board was received by the Minister; or

(c) either party has requested the Minister in writing to appoint a concilation board to endeavour to bring about agreement between them and fifteen days have elapsed since the Minister

received the said request, and

(i) no notice under subsection (2) of Section 29 has been given by the Minister, or

(ii) the Minister has notified the party so requesting that he has decided not to appoint a conciliation board.

TRADE UNION ACT (NOVA SCOTIA)

Section 19(1) Every collective agreement entered into after the commencement of this Act shall contain a provision for final settlement without stoppage of work, by arbitration or otherwise, of all differences between the parties to or persons bound by the agreement or on whose behalf it was entered into, concerning its meaning or violation.

(2) Where a collective agreement, whether entered into before or after the commencement of this Act, does not contain a provision as required by this Section, the Board shall, upon application of either party to the agreement, by order, prescribe a provision for such purpose and a provision so prescribed shall be deemed to be a term of the collective agreement and binding on the parties to and all persons bound by the agree-

ment and all persons on whose behalf the agreement was entered into.

(3) Every party to and every person bound by the agreement, and every person on whose behalf the agreement was entered into, shall comply with the provisions for final settlement contained in the agreement.

Section 22(1) Except in respect of a dispute that is subject to subsection (2)

(a) no employer bound by or who is a party to a collective agreement, whether entered into before or after the commencement of this Act, shall declare or cause a lockout with respect to any employee bound by the collective agreement or on whose behalf the collective agreement was entered into; and

(b) during the term of the collective agreement, no employee bound by a collective agreement or on whose behalf a collective agreement has been entered into, whether entered into before or after the commencement of this Act, shall go on strike and no bargaining agent that is a party to the agreement shall declare or authorize a strike of any such employee.

(2) Where a collective agreement is in force and any dispute arises between the parties thereto with reference to the revision of a provision of the agreement that by the provisions of the agreement is subject to revision during the term of the agreement, the employer bound thereby or who is a party thereto shall not declare or cause a lockout with respect to any employee bound thereby or on whose behalf the collective agreement has been entered into, and no such employee shall strike and no bargaining agent that is a party to the agreement shall declare or authorize a strike of any such employee until:

(a) the bargaining agent of such employees and the employer or representatives authorized by them on their behalf have bargained collectively and have failed to conclude an agreement on the matters in dispute; and either

(b) a conciliation officer has been appointed and has failed to bring about an agreement between the parties and twenty-one days have elapsed from the date on which the report of the conciliation officer was made to the Minister; or

(c) a conciliation board has been appointed to endeavour to bring about agreement between the parties and seven days have elapsed from the date on which the report of the conciliation

board was received by the Minister.

THE LABOUR RELATIONS ACT (ONTARIO)

Section 34(1) Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.

(2) If a collective agreement does not contain such a provision as is mentioned in subsection 1, it shall be deemed to contain the following provision:

Where a difference arises between the parties relating to the interpretation, application or administration of this agreement, including any question as to whether a matter is arbitrable, or where an allegation is made that this agreement has been violated, either of the parties may, after exhausting any grievance procedure established by this agreement, notify the other party in writing of its desire to submit the difference or allegation to arbitration and the notice

shall contain the name of the first party's appointee to an arbitration board. The recipient of the notice shall within five days inform the other party of the name of its appointee to the arbitration board. The two appointees so selected shall, within five days of the appointment of the second of them, appoint a third person who shall be the chairman. If the recipient of the notice fails to appoint an arbitrator, or if the two appointees fail to agree upon a chairman within the time limited, the appointment shall be made by the Minister of Labour for Ontario upon the request of either party. The arbitration board shall hear and determine the difference or allegation and shall issue a decision and the decision is final and binding upon the parties and upon any employee affected by it. The decision of a majority is the decision of the arbitration board, but if there is no majority the decision of the chairman governs.

(3) If, in the opinion of the Board, any part of the arbitration provision, including the method of appointment of the arbitrator or arbitration board, is inadequate, or if the provision set out in subsection 2 is alleged

by either party to be unsuitable, the Board may, on the request of either party, modify the provision so long as it conforms with subsection 1, but, until so modified, the arbitration provision in the collective agreement or in subsection 2, as the case may be, applies.

(4) Notwithstanding subsection 3, if there is a failure to appoint an arbitrator or to constitute a board of arbitration under a collective agreement, the Minister, upon the request of either party, may appoint the arbitrator or make such appointments as are necessary to constitute the board of arbitration, as the case may be, and any person so appointed by the Minister shall be deemed to have been appointed in accordance with the collective agreement.

(5) Where the Minister has appointed an arbitrator or the chairman of a board of arbitration under subsection 4, each of the parties shall pay one-half the remuneration and expenses of the person appointed, and, where the Minister has appointed a member of a board of arbitration under subsection 4 on failure of one of the parties to make the appointment, that party shall pay the remuneration and expenses of the person appointed.

(6) Where a difference has been submitted to arbitration under this section and a party to the arbitration complains

to the Minister that the arbitrator or the arbitration board, as the case may be, has failed to render a decision within a reasonable time, the Minister may, after consulting the parties and the arbitrator or the arbitration board, issue whatever order he deems necessary in the circumstances to ensure that a decision will be rendered in the matter without further undue delay.

(7) An arbitrator or the chairman of an arbitration board, as the case may be, has power,

(a) to summon and enforce the attendance of witnesses and to compel them to give oral or written evidence on oath in the same manner as a court of record in civil cases; and

(b) to administer oaths,

and an arbitrator or an arbitration board, as the case may be, has power,

(c) to accept such oral or written evidence as the arbitrator or the arbitration board, as the case may be, in its discretion deems proper, whether admissible in a court of law or not;

(d) to enter any premises where work is being done or has been done by the employees or in which the employer carries on business or where anything is taking place or has taken place concerning any of

the differences submitted to him or it, and inspect and view any work, material, machinery, appliance or article therein and interrogate any person respecting any such thing or any of such differences;

(e) to authorize any person to do anything that the arbitrator or arbitration board may do under clause d and to report to the arbitrator or the arbitration board thereon.

(8) The decision of an arbitrator or of an arbitration board is binding,

(a) upon the parties; and

(b) in the case of a collective agreement between a trade union and an employers' organization, upon the employers covered by the agreement who are affected by the decision; and

(c) in the case of a collective agreement between a council of trade unions and an employer or an employers' organization, upon the members or affiliates of the council and the employer or the employers covered by the agreement, as the case may be, who are affected by the decision; and

(d) upon the employees covered by the agreement who are affected by the decision,

and such parties, employers, trade unions and employees shall do or abstain from doing anything required of them

by the decision.

(9) Where a party, employer, trade union or employee has failed to comply with any of the terms of the decision of an arbitrator or arbitration board, any party, employer, trade union or employee affected by the decision may, after the expiration of fourteen days from the date of the release of the decision or the date provided in the decision for compliance, whichever is later, file in the office of the Registrar of the Supreme Court a copy of the decision, exclusive of the reasons therefor, in the prescribed form, whereupon the decision shall be entered in the same way as a judgment or order of that court and is enforceable as such.

(10) The Arbitrations Act does not apply to arbitrations under collective agreements.

Section 54(1) Where a collective agreement is in operation, no employee bound by the agreement shall strike and no employer bound by the agreement shall lock out such an employee.

THE INDUSTRIAL RELATIONS ACT (PRINCE EDWARD ISLAND)

Section 23(1) Every collective agreement entered into after

the commencement of this Act shall contain a provision for final settlement without stoppage of work, by arbitration or otherwise, of all differences between the parties to or persons bound by the agreement or on whose behalf it was entered into, concerning its meaning or violation.

(2) Where a collective agreement, whether entered into before or after the commencement of this Act, does not contain a provision as required by this Section, the Board shall, upon application of either party to the agreement, by order, prescribe a provision for such purpose and a provision so prescribed shall be deemed to be a term of the collective agreement and binding on the parties to and all persons bound by the agreement and all persons on whose behalf the agreement was entered into.

(3) Every party to and every person bound by the agreement, and every person on whose behalf the agreement was entered into, shall comply with the provision for final settlement contained in the agreement.

Section 39(1) Except in respect of a dispute that is subject to subsection (2)

(a) no employer bound by or who is a party to a collective agreement, whether entered into before

or after the commencement of this Act, shall declare or cause a lockout with respect to any employee bound by the collective agreement or on whose behalf the collective agreement was entered into; and

(b) during the term of the collective agreement, no employee bound by a collective agreement or on whose behalf a collective agreement has been entered into, whether entered into before or after the commencement of this Act, shall go on strike and no bargaining agent that is a party to the agreement shall declare or authorize a strike of any such employee.

(2) Where a collective agreement is in force and any dispute arises between the parties thereto with reference to the revision of a provision of the agreement that by the provisions of the agreement is subject to revision during the term of the agreement the employer bound thereby or who is a party thereto shall not declare or cause a lockout with respect to any employee bound thereby or on whose behalf the collective agreement has been entered into, and no such employee shall strike and no bargaining agent that is a party to the agreement shall declare or authorize a strike of any such employee until the

conciliation procedures as set forth in Sections 25 to 26 inclusive have been complied with where the Minister has decided not to appoint a Conciliation Board or Sections 27 to 35 inclusive have been complied with when the minister decides to appoint a Conciliation Board.

LABOUR CODE (QUEBEC)

Section 88. Every grievance shall be submitted to arbitration in the manner provided in the collective agreement if it so provides and the parties abide by it; otherwise it shall be referred to an arbitration officer chosen by the parties or, failing agreement, appointed by the Minister.

Section 89. The arbitration award shall be final and bind the parties.

Section 95. It is forbidden to strike during the period of a collective agreement, unless the agreement contains a clause permitting the revision thereof by the parties and the conditions prescribed in the preceding section have been observed.

THE CANADA ACT

Section 19(1) Every collective agreement entered into after the 1st day of September, 1948, shall contain a provision for final settlement without stoppage of work, by arbitration or otherwise, of all differences between the parties to or persons bound by the agreement or on whose behalf it was entered into, concerning its meaning or violation.

(2) Where a collective agreement, whether entered into before or after the 1st day of September, 1948, does not contain a provision as required by this section, the Board shall, upon application of either party to the agreement, by order, prescribe a provision for such purpose and a provision so prescribed shall be deemed to be a term of the collective agreement and binding on the parties to and all persons bound by the agreement and all persons on whose behalf the agreement was entered into.

(3) Every party to and every person bound by the agreement, and every person on whose behalf the agreement was entered into, shall comply with the provision for final settlement contained in the agreement and give effect thereto.

Section 22(1) Except in respect of a dispute that is subject to the provisions of subsection (2)

(a) no employer bound by or who is a party to a collective agreement, whether entered into before or after the 1st day of September, 1948, shall declare or cause a lockout with respect to any employee bound by the collective agreement or on whose behalf the collective agreement was entered into, and

(b) during the term of the collective agreement, no employee bound by a collective agreement or on whose behalf a collective agreement has been entered into, whether entered into before or after the 1st day of September, 1948, shall go on strike and no bargaining agent that is a party to the agreement shall declare or authorize a strike of any such employee.

(2) Where a collective agreement is in force and any dispute arises between the parties thereto with reference to the revision of a provision of the agreement that by the provisions of the agreement is subject to revision during the term of the agreement, the employer bound thereby or who is a party thereto shall not declare or cause a lockout with respect to any employee bound thereby or on whose behalf the collective agreement has

been entered into, and no such employee shall strike and no bargaining agent that is a party to the agreement shall declare or authorize a strike of any such employee until

(a) the bargaining agent of such employees and the employer or representatives authorized by them on their behalf have bargained collectively and have failed to conclude an agreement on the matters in dispute, and either

(b) a Conciliation Board has been appointed to endeavour to bring about agreement between them and seven days have elapsed from the date on which the report of the Conciliation Board was received by the Minister, or

(c) either party has requested the Minister in writing to appoint a Conciliation Board to endeavour to bring about agreement between them and fifteen days have elapsed since the Minister received the said request and

(i) no notice under subsection (2) of section 28 has been given by the Minister, or

(ii) the Minister has notified the party so requesting that he has decided not to appoint a Conciliation Board.

APPENDIX "B"

MacKay, McLennan and Evans, JJ.A.

IN THE MATTER OF an Arbitration initiated by the Toronto Mailers' Union No. 5, against The Globe and Mail Limited, Telegram Publishing Company Limited and Toronto Star Limited

BETWEEN:

ROBERT EARLES and ROBERT McKEE, on their own behalf and on behalf of all other members of Toronto Mailers' Union No. 5,

Applicants

- and -

HIS HONOUR JUDGE HAROLD E. FULLER, T.E. ARMSTRONG and J.F. HOWARD,

Respondents.

Ian Scott, Esq. and A. Ryder, Esq. for the Applicants Appellants

C.L. Dubin, Esq., Q.C. and J. Brunner, Esq. for the Respondents.

Appeal Heard: February 15 and 16, 1968.

MacKAY, J.A.:

This is an appeal by the applicants from the order of The Honourable Mr. Justice Jessup dated January 25th, 1967, dismissing their application for an order in lieu of a writ of certiorari removing into the Supreme Court and quashing the award dated January 31, 1966 made by an Arbitration Board consisting of His Honour Judge Harold E. Fuller, J.F. Howard and T.E. Armstrong, wherein the majority of the Board dismissed two grievances instituted by Toronto Mailers' Union No. 5 with respect to each of The Globe and Mail Limited, Telegram Publishing Company Limited and Toronto Star Limited.

The facts are fully stated in the award of the arbitrators and in the judgment of The Honourable Mr. Justice Jessup and need only be restated in skeleton form.

All three agreements contained a clause 703 A as follows:

> "No employee covered by this agreement shall be required to cross a picket line established because of a legal strike or any lockout of Toronto Typographical Union No. 91".

Paragraphs 1001 (1) and (2) of the collective agreements contained provisions for payment by the employers of certain hospitalization and other like benefits.

On July 9, 1964 Toronto Typographical Union No. 91 commenced a lawful strike and set up picket lines. Consequent upon the establishment of the picket lines, most of the members of Toronto Mailers' Union No. 5 in concert failed to report to work at the newspapers and members of Toronto Mailers' Union No. 5 joined the picket lines established by the Toronto Typographical Union No. 91 and as was found by the majority of the Board, besides picketing the newspapers, members of Toronto Mailers' Union No. 5, in co-operation with the members of Toronto Typographical Union No. 91, engaged in other activities directed against the newspapers. For example, publicity campaigns against the newspapers, telephone campaigns to secure cancellations of subscriptions, picketing advertisers and other matters more fully set out in the report of the majority of the Board.

The newspapers continued to pay contributions for hospitalization and other fringe benefits for some three months after July 9, 1964, following which they notified Toronto Mailers' Union No. 5 that they were discontinuing such contributions. This resulted in the first grievance.

The collective agreement between the companies and the Toronto Mailers' Union No. 5 expired on December 31, 1964. Negotiations for a new contract were carried on from November 1964. In the first week of April 1965 an official of the Union verbally notified the companies that many of the members wished to return to work. Negotiating meetings as to a new contract were held prior to April 20, 1965.

The letters to each of the companies invoking the second grievance dated April 20, 1965 were in part as follows:

> "The overwhelming majority of our members who work in the (paper concerned) have signified individually to me that they wish to return to work and whatever process is necessary (sic) to accomplish their aim, which in our mind is legally sound under the present agreement, should be carried out.
>
> On behalf of these members, please accept this letter as notification that we invoke Clause 1101 [illegible] the agreement (joint standing) and the clause we wish to process through the grievance procedure is Clause 703 A (picket line)."

Early in May, a Committee on behalf of the companies and a Committee duly authorized by Toronto Mailers' Union No. 5, reached a new agreement which provided in detail for the time,

manner and plan of return to work. About May 7th the Executive Council of the International Typographical Union in the United States directed the members of Toronto Mailers' Union No. 5 to repudiate the agreement, which was done. On being notified of the repudiation, the companies asked for the appointment of a conciliation officer. No further negotiations took place pending the hearing of the grievances.

The majority decision of the Board dismissed both grievances on the ground that the conduct of those employees who had engaged in the activities to which I have referred justified the position taken by the employers in respect of those employees. The principle upon which the majority of the Board acted was that "an employee is under a duty to serve his employer with good faith and fidelity and not deliberately do something which may harm his employer's business".

Mr. Justice Jessup agreed with the majority of the Board that this duty was an implied term of the collective agreement.

Much of the argument in this Court was directed to the question of whether this duty was an implied term of the individual contract of hiring or of the collective agreement, the submission being that if it is an implied term of the individual contract, then it is not an implied term of the collective agreement and the Board hearing a grievance under a collective agreement is without jurisdiction to take it into consideration.

While this duty has been referred to in many of the cases as an implied term of the contract of service (Hivack Limited v. Park Royal Scientific Instruments Limited [1946] 1 All E.R. 350), in the case of Robb v. Green [1895] 2 Q.B. 215 referred to in the Hivack case, Smith, L.J. put it this way:

> "I think that it is a necessary implication which must be engrafted on such a contract".

In the same case, Kay, L.J. at p. 318-19 said:

> "In Yovatt v. Winyard 1 J. & W. 394, the defendant was employed by the plaintiff, the proprietor of certain recipes for veterinary medicines, as an assistant, under an agreement by which he was to be instructed in the general knowledge of the business, but was not to be taught the mode of composing the medicines. The defendant surreptitiously got access to the book of recipes and copied them, and then, leaving the plaintiff's service, set up in business for himself and sold medicines similar to those sold by the plaintiff. Lord Eldon granted an injunction against him 'upon the ground of there having been a breach of trust and confidence'. There have been many similar decisions subsequently to which it is unnecessary to refer; but in Morison v. Moat 9 Hare, 241, 255, Turner V. - C. sums up the law on the subject thus: 'The plaintiff's case was rested in argument upon the ground that the defendant had obtained this secret by breach of faith or of contract on the part of Thomas Moat.' Then, after mentioning a subsidiary ground on which relief was claimed, he goes on: 'The true question is whether, under the circumstances of this case, the Court ought to interpose by injunction, upon the ground of breach of faith or of contract. That the Court has exercised jurisdiction in cases of this nature does not, I think, admit of any question. Different grounds have indeed been assigned for the exercise of that jurisdiction. In some cases it has been referred to property, in others to contract; and in others,again, it has been treated as founded upon trust or confidence - meaning, as I conceive, that the Court fastens the obligation on the conscience of the party, and enforces it against him in the same manner as it enforces against a party to whom a benefit is given the obligation of performing a promise on the faith of which the benefit

> has been conferred; but upon whatever grounds the jurisdiction is founded, the authorities leave no doubt as to the exercise of it.' Then he refers to the language of Lord Cottenham in Prince Albert v. Strange 1 Mac. & G. 25, where he says: 'This case by no means depends solely upon the question of property, for a breach of trust, confidence, or contract, would of itself entitle the plaintiff to an injunction.'
>
> In the later case of Lamb v. Evans [1893] 1 Ch. 218, Bowen L.J. distinctly treats the matter as depending at law upon an implied contract arising out of the confidential relations between the master and servant. On whatever ground it is put, it is clear in this case that an injunction ought to be granted, either on the ground of breach of trust or breach of contract".

In Pearce v. Foster (1886) 17 Q.B.D., Lord Esher, M.R. said:

> "The rule of law is, that where a person has entered into the position of servant, if he does anything incompatible with the due or faithful discharge of his duty to his master, the latter has a right to dismiss him. The relation of master and servant implies necessarily that the servant shall be in a position to perform his duty duly and faithfully, and if by his own act he prevents himself from doing so, the master may dismiss him".

Having regard to these authorities, while I think the duty could be said to be an implied term of both the contract of hiring and the collective agreement, for the purpose of determining the jurisdiction of the Board, I prefer to state it as a duty established by the common law that is inherent in and attaches to the relationship of master and servant. The relationship of employer and employee being established, the duty attaches to the relationship as a matter of law, whether there is or is not a collective agreement.

As was said by Judson, J. in Le Syndicat Catholique des Employes de Magasins de Quebec Inc. v. La Compagnie Paquet Ltee. [1959] S.C.R. 206 at 212:

> "The collective agreement tells the employer on what terms he must in future conduct his master and servant relations".

It follows that if on the facts this duty of an employee to his employer is relevant to the grievance, it is within the competence of the Board hearing the grievance to take it into consideration unless it is excluded by the terms of the hiring or of the collective agreement. It is to be noted that in the present case the Union gives recognition to the fact that the duty is applicable to employees under a collective agreement by including in the agreement Clause 703 A, which permits the employees to refrain from doing something that in the absence of this provision it would be their duty to do.

It was also argued that the majority of the Board, by their decision, in effect allowed the respondents to repudiate the collective agreement. As to this it is to be noted that the grievances are by the Union on behalf of those employees who had refused to return to work. The Board made it clear that they were dealing only with the rights of those members of the Union who were in breach of their duty to serve their employer in good faith and fidelity and not deliberately injure the employer's business and, as to this, the employers only suspended the payment of benefits during the unlawful activities of those employees and, as to the

second grievance, the employees were not discharged nor was their representative who wrote on their behalf given an unqualified refusal of their request to return to work, but was told that they could return upon their entering into a new agreement and, as I have said, a new agreement was arrived at but later repudiated by the Union.

In respect to the other matters that were raised on the appeal, I am in agreement with the reasons and conclusions of the learned Judge of first instance and would dismiss the appeal with costs.

J.A. Macleay J.A.

I agree

J.M. Lennox J.A.

Sgd. Roger Taschereau J.A.

CONFIDENTIAL

TITLE: PILOT EMPIRICAL STUDY OF LABOUR ARBITRATION HEARINGS IN ONTARIO

AUTHOR: Professor Stanley Schiff,
Faculty of Law,
University of Toronto,
TORONTO 5, Ontario.

DRAFT STUDY

prepared for

TASK FORCE ON LABOUR RELATIONS
(Privy Council Office)

PROJECT NO. 38 (b) Part II

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PART II

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Project 38b (Part 2)

PILOT EMPIRICAL STUDY OF LABOUR ARBITRATION HEARINGS IN ONTARIO

Project Director: S. A. Schiff

PART ONE: OBJECT OF THE STUDY

As first conceived, the object of this pilot empirical study was to gather information in a preliminary way about certain procedural aspects of labour arbitration hearings. These procedural aspects included the composition and choice of the arbitration tribunal, the qualifications of the arbitrator(s), the use by the parties of legal or other independent counsel, the stage of the grievance procedure at which independent counsel was retained, methods of issue-definition by the parties prior to and at the hearing, whether or not witnesses were sworn at the hearing, whether witnesses were excluded before they were formally called, whether a "view" was ordered at the hearing, which party led evidence first and the nature of the issues in each such case, the method of educating the arbitrator(s) regarding the background of the dispute, analogy of witness examination to court trial procedure, treatment of hearsay, and relative formality or informality of the hearing.

As soon as the actual investigation began, the scope of the inquiry broadened. The study as carried out focuses equally upon various aspects of labour arbitration as a process

of dispute-determination: the actual conduct and motivation of the arbitrators before, during and after the hearing; definitions of the proper role of the nominees; sources of decisional and remedial rules; definitions of purposes which the chairmen and sole arbitrators attempt to forward; and the relative satisfaction of the parties with the process.

PART TWO: METHOD AND SAMPLE

The Project Director and/or one or two assistants personally attended and observed arbitration hearings in and near Metropolitan Toronto during the summer of 1967. At or after each hearing, with the exception of one party employer and one party union, each arbitrator, counsel and party was interviewed pursuant to a uniform questionnaire. (The excepted party employer refused to talk to us, alleging that we may have been union spies; the excepted party union proved very difficult to reach after the hearing.)

In all, 24 different labour arbitration hearings were observed, the first on July 7th, 1967 and the last on September 6th, 1967. Initially, we planned to attend only those hearings which were held in Metropolitan Toronto. However, after learning the summer schedule of various active chairmen, we expanded the geographical area, drawing the limit only by considerations of time and personnel. As a result, 18 of the 24 hearings which we attended were held in the King Edward Hotel, Toronto; two were held in St. Catharines; and one each in Guelph, Collingwood, Hamilton and Kitchener. With more time

and personnel, we might also have attended hearings scheduled by some of the same chairmen during the same time period in London and Kingston.

Seventeen of the hearings were observed from beginning to end; the first half of five other hearings was observed; the last half of one other hearing was observed; one hearing ended before formal completion when the parties negotiated settlement during the course of the hearing. Of the 18 hearings which were formally completed during our attendance and observation, six consumed half day; four consumed three-quarter day; six consumed a full day; two consumed two days.

Of the 24 hearings which we observed, 22 were held pursuant to The Labour Relations Act (Ontario), and two pursuant to the Industrial Relations and Disputes Investigation Act (Canada).

Because of the small number of hearings in the sample, the limited geographical area from which the sample was drawn, and the limited period of time within which observations were made, even tentative conclusions are for the most part unwarranted. For this reason, this report will be mostly descriptive and not evaluative. Where, however, certain arithmetic results appear to warrant some generalized inference (perhaps only subjectively to the Project Director), some evaluation will be attempted.

PART THREE: PARTIES AND ISSUES

The 24 hearings involved 23 different party employers; one employer was involved in two separate hearings involving two different grievances. A list of the party employers follows:

Canadian National Telecommunications, Toronto

Federal Wire and Cable (Canada) Ltd., Guelph

Seiberling Rubber Co., Ltd., Toronto

Steinberg's Ltd., Toronto

Phillips Electronics Industries, Toronto

Maple Leaf Milling Co. Ltd., Port Colborne

Air Canada, Montreal

Collingwood Shipyards (division of Canadian Shipbuilding and Engineering Ltd.), Collingwood

Lake Ontario Steel Co., Ltd., Whitby (two arbitrations)

Canada Bread Ltd., Toronto

Albert Raith Cement Contractor Ltd., Kitchener

Automotive Hardware Ltd., Long Branch

Liquid Carbonic Canadian Corp. Ltd., Toronto

Toronto Hydro-Electric Power Commission, Toronto

Russell Steel Ltd., Concord

Steel Distributors of Toronto Ltd., Toronto

Loblaw Groceterias Co. Ltd., Toronto

The Pedlar People Ltd., Oshawa

Foster-Wheeler Steel Co. Ltd., St. Catharines

Canada Packers Ltd., Toronto

Fittings Ltd., Oshawa

Electric Storage Battery Co. Ltd., Toronto

Rexall Drug Co., Cooksville

The 24 hearings involved 23 different party unions, two of which were involved in the same hearing with one employer and one of which was involved in two different hearings with the same employer concerning two different grievances. Of the 23 different party unions, two of them were national unions and 21 were locals of national and international unions. These latter different local unions belong to two different national unions and 10 different international unions. Except for the United Steelworkers of America and the United Packinghouse, Food and Allied Workers' Union, no local of any national or international union was involved in more than one hearing. Ten of the 24 hearings involved 10 different locals of the United Steelworkers of America; two of the 24 hearings involved two different locals of the United Packinghouse, Food and Allied Workers' Union. A list of the party unions follows:

International Chemical Workers' Union, Local 179

The Commercial Telegraphers' Union, Division 43

United Steelworkers of America, Local 6320

United Steelworkers of America, Local 3021

United Steelworkers of America, Local 6571 (2 arbitrations)

United Steelworkers of America, Local 7105

United Steelworkers of America, Local 6473

United Steelworkers of America, Local 6275

United Steelworkers of America, Local 6950

United Steelworkers of America, Local 1817

United Steelworkers of America, Local 6519) one
) arbitration
United Steelworkers of America, Local 6595) together

United Rubber, Cork, Linoleum and Plastic Workers of America, Local 118

Amalgamated Meat Cutters and Butcher Workmen of North America, Local 633

International Brotherhood of Electrical Workers, Local 1590

Canadian Airline Employees Association

Retail, Wholesale, Bakery & Confectionary Workers' Union, Local 461 (A local of the Retail, Wholesale and Department Store Union)

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 879

Canadian Union of Operating Engineers, Local 101

United Packinghouse, Food and Allied Workers, Local 114

United Packinghouse, Food and Allied Workers, Local 452

International Union of Electrical, Radio and Machine Workers, Local 512

Union of Canadian Retail Employees (CLC)

All 24 hearings involved employee or union grievances. These grievances may be classified as follows:

(a) Dismissal without just cause: 9

theft: 2
drinking, etc.: 2
non-disclosure of compensation history: 1
uninsurability of driver: 1
history of absence: 1
fighting: 1
participation in wildcat strike: 1

(b) Suspension without just cause: 4

destruction of employer property: 1
refusing to perform assigned work: 1
failure to phone in when sick: 1
inability to co-operate with supervisor: 1

(c) Management rights: 5

qualification added to job requirements: 1
sick pay stopped: 1
change of computation of commission: 1
change of working hours abolishes paid lunch-time: 1
foreman performs work ordinarily performed by those in the bargaining unit: 1

(d) Job classification: 2

(e) Determining date from which back pay should be calculated after job reclassification: 1

(f) Sick pay stopped on allegation of malingering: 1

(g) Determination of employer contribution to pension plan: 1

(h) Nature of seniority rights after amalgamation of employer's separate operations: 1

Due to the wide variation in fact-situations, complexity of evidence, and methods of presentation at the hearing, there was no discernable relation between the nature of the grievance as above classified and the length of the hearings.

PART FOUR: COMPOSITION OF ARBITRATION TRIBUNALS

In all but two of the 24 hearings attended, a three-man board (consisting of an employer nominee, a union nominee, and a presiding chairman) was used.

1. CHAIRMAN AND SOLE ARBITRATOR

Nine different men appeared as chairmen or sole arbitrator in the 24 hearings. In six of these hearings, the

chairman or sole arbitrator had been appointed by the Minister of Labour. The respective names of the nine different men, their qualifications, the number of their appearances, whether each was appointed by the Minister, and the classifications of grievances which each heard, follow:

J.W.F. Weatherill	Vice-chairman, Ontario Labour Relations Board	6 times chairman (1 appointment by Minister)	2 dismissal 1 suspension 2 job classification 1 determination of employer contribution to pension plan
John A. Brown	Alternate Chairman, Ontario Labour Relations Board	1 time chairman	1 dismissal
J.A. Hanrahan	Professional labour arbitrator (retired magistrate)	6 times chairman (1 appointment by Minister)	2 dismissal 1 suspension 3 management rights (qualification added to job requirements; sick pay stopped; change of computation of commission
Earl E. Palmer	Teacher of labour law, Faculty of Law, University of Western Ontario, London	3 times chairman	2 dismissal 1 management rights (change of working hours abolishes paid lunch-time
Harry W. Arthurs	Teacher of labour law, Osgoode Hall Law School, Toronto	2 times sole arbitrator (1 appointment by Minister)	1 suspension 1 nature of seniority rights upon amalgamation of employer's separate operations

J.L. Roberts, Q.C.	Lawyer-magistrate, Niagara Falls	2 times chairman (1 appointment by Minister)	1 dismissal 1 sick pay stopped on allegation of malingering
Harvey McCullough, Q.C.	Crown Attorney, Hamilton	2 times chairman (2 appointments by Minister)	1 dismissal 1 determining date from which back pay should be calculated
Trevor Smith	Professional industrial relations consultant	1 time chairman	1 management rights (foreman performing work ordinarily performed by those in the bargaining unit)
James B. Metzler	Retired Deputy Minister of Labour for Ontario	1 time chairman	1 suspension

2. EMPLOYER NOMINEES

In the 22 hearings where three-man boards were used, 15 different men appeared as employer nominees. Their respective names, qualifications, and total number of appearances follow:

C.A. Morley	Solicitor with Miller, Thompson, Hicks, Sedgewick, Lewis and Healey, Toronto	3 times
J.W. Healey, Q.C.	Solicitor with Miller, Thompson, Hicks, Sedgewick, Lewis and Healey, Toronto	1 time
F.G. Hamilton	Solicitor with Miller, Thompson, Hicks, Sedgewick, Lewis and Healey, Toronto	1 time
A.J. Clark	Solicitor with Mathews, Dinsdale and Clark, Toronto	2 times
N.M. Rogers, Q.C.	Solicitor with Tilley, Carson, Findlay and Wedd, Toronto	1 time
W.J. Whittaker, Q.C.	Solicitor with Wardlaw and Whittaker, Toronto	1 time
Benjamin Lamb	Solicitor with Dillon, Cronin and Lamb, Toronto	1 time
T.E. Houck	Independent industrial relations counsellor	2 times
Ivan McGowan	Independent industrial relations counsellor	2 times

D.G. Pyle	Independent industrial relations counsellor	2 times
J.V. Cuff (same firm)	Member of independent industrial relations counselling firm	1 time
R.A. Williamson (same firm)	Member of independent industrial relations couselling firm	1 time
Michael O'Brien	Personnel relations manager of a company other than the party employer	2 times
D.H. Wallace	Personnel relations manager of a company other than the party employer	1 time
J.R. Mc Farland	Personnel relations manager of a company other than the party employer	1 time

From the chart, it may be seen that ten of the 22 three-man boards had a lawyer as the employer nominee, and that five of these boards had one of three different lawyers from one particular Toronto law firm. Eight of the 22 three-man boards had an independent management industrial relations consultant as the employer nominee; of these eight, two were members of the same firm of consultants. Four of the three-man boards had a personnel manager of a company other than the party employer.

3. UNION NOMINEES

In the 22 hearings where three-man boards were used, 16 different men appeared as union nominees. Their respective names, qualifications, and total number of appearances, as well as the party union involved, follow:

Lynn Williams	District representative, United Steelworkers of America	3 times	Union of Canadian Retail Employees
			United Steelworkers of America, Local 7105
			United Steelworkers of America, Local 1817
Dwight Storey	Legislative director United Steelworkers of America	2 times	United Steelworkers of America, Local 6320
			United Steelworkers of America, Local 6571
Herbert Gargrave	District representative, United Steelworkers of America	2 times	United Steelworkers of America, Local 6571
			United Steelworkers of America, Local 6950
Robert Nicol	Staff representative, United Steelworkers of America	1 time	United Steelworkers of America, Local 6473
Chris Trower	Staff representative, United Steelworkers of America	1 time	United Steelworkers of America, Local 6275
Yves Dulude	Staff representative, United Steelworkers of America	1 time	United Steelworkers of America, Locals 6519 and 6595
Giles Endicott	District research director, United Packinghouse, Food and Allied Workers	1 time	United Packinghouse, Food and Allied Workers, Local 114
Maurice Keck	Business representative, United Steelworkers of America	1 time	United Packinghouse, Food and Allied Workers, Local 452
Jerry Shea	President, Local 113, United Rubber, Cork, Linoleum and Plastic Workers of America	1 time	United Rubber, Cork, Linoleum and Plastic Workers of America, Local 118

Henry Weisbach	Executive Secretary, Ontario Federation of Labour	2 times	International Brotherhood of Electrical Workers, Local 1590 International Union of Electric, Radio and Machine Workers, Local 512
Stanley Bullock	N.D.P. full-time organizer	2 times	International Chemical Workers' Union, Local 179 Canadian Union of Operating Engineers, Local 101
W. J. Ogilvie	Officer, Brotherhood of Painters, Decorators and Paperhangers of America	1 time	The Commercial Telegraphers Union, Division 43
L. Lenkinski	Business representative, Upholsters' International Union of North America	1 time	Amalgamated Meat Cutters and Butcher Workmen of North America, Local 633
I. J. Thompson	Coordinator, Joint Council #52, and Representative, Central Conference, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America	1 time	International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 879
Ian Scott	Solicitor with Brewin, McCallum and Scott, Toronto	1 time	Canadian Airline Employees Association
Stanley Simpson	Solicitor with Shekter and Simpson, Hamilton	1 time	Retail, Wholesale, Bakery and Confectionary Workers' Union, Local 461

From the chart, it may be seen that 14 of the 22 three-man boards had an international union representative as the union nominee. In 12 hearings out of these 14, the international union representative belonged to the same international union of which the party union was a local; in all 9 hearings involving a local of the United Steelworkers of America using three-man boards, the union nominee was a staff representative of the United Steelworkers of America. In four hearings, the union nominee was an officer or representative of another international union or local thereof; in two hearings, the union nominee was an officer of the Ontario Federation of Labour; and in two hearings, the union nominee was a full-time organizer for the New Democratic Party. Only two of the 22 three-man boards had a union nominee who was a lawyer -- compared to ten boards which had an employer nominee who was a lawyer.

PART FIVE: USE BY PARTIES OF LAWYER OR OTHER INDEPENDENT COUNSEL

1. EMPLOYER'S COUNSEL

In 17 out of 24 arbitrations observed, the employer retained independent counsel (i.e., counsel who was not ordinarily an employee of the employer). In 9 of these 17, the independent counsel was a lawyer, while in the 8 others the counsel was an industrial relations consultant. One particular lawyer appeared as employer counsel at three different hearings, while one industrial relations consultant appeared at two different hearings. All other independent counsel appeared at only one hearing. The particular lawyer who appeared

three times as employer counsel also served as employer nominee on one of the three-man boards, and is a member of the law firm that supplied five of the employer nominees for the 22 three-man boards.

In seven of the eight hearings where the employer did not retain independent counsel, the director of the employer's industrial relations department (or an employee in that department) acted as an employer's counsel. In the other hearing, a member of the employer's law department (who is a lawyer) acted as employer's counsel.

The stage of the grievance-arbitration procedure at which independent legal or industrial relations counsel were called in to handle the proceedings, and the particular classifications of grievance, are set out below:

	Lawyer	Industrial Relations Counsel
Before grievance filed	1 - management rights	3: 1 - dismissal 1 - management rights 1 - suspension
As soon as grievance filed	3: 2 - dismissal 1 - job classification	1 - dismissal
During grievance steps	2: 1 - dismissal 1 - seniority rights	0
After union call for arbitration and before choice of nominee or arbitrators	3: 2 - management rights 1 - dismissal	2: 1 - job classification 1 - dismissal
After nominee chosen	0	0
After full board constituted	0	1 - suspension
[No Response]		1

Most of the independent counsel for the employers agreed that they should be retained as early as possible in the grievance-arbitration procedure so that they might guide the employer's tactics. In certain kinds of cases, they favoured consultation before the employer ever took action which might provoke a grievance.

2. UNION'S COUNSEL

In eight out of the 24 arbitrations observed, the union retained independent counsel (i.e., counsel who was not ordinarily an employee of the union). In all of these eight, the independent counsel was a lawyer. One particular lawyer appeared as union counsel at two different hearings. This same lawyer is a member of the same law firm as two other lawyers who each appeared once as union counsel at the arbitrations observed. In addition, another two lawyers were both associated in a single law firm. In one of the 24 arbitrations, while a lawyer appeared as counsel to the union, this lawyer is counsel to the international union of which the party union is a local.

In seven of the 10 arbitrations involving a local of the United Steelworkers of America, union counsel was an international staff or district representative of the United Steelworkers of America, and one such staff representative appeared three times as counsel. In one other of these 10 arbitrations, union counsel was an international legislative director of the United Steelworkers of America. One of these

staff representatives also acted as the union board nominee in one other hearing involving a local of the United Steelworkers of America, and this same legislative director acted as union board nominee in two other such hearings.

In the two hearings involving two different locals of the United Packinghouse, Food and Allied Workers, two different international representatives of the United Packinghouse, Food and Allied Workers appeared as counsel to the respective local. In the one hearing involving a local of the Retail, Wholesale and Department Store Union, an international representative of that union appeared as union counsel. In the one hearing involving a local of the Amalgamated Meat Cutters and Butcher Workmen of North America, the president of the Ontario District Council of that union appeared as union counsel. In three other hearings involving respectively a local of the Canadian Union of Public Employees, the Canadian Union of Operating Engineers, and the International Brotherhood of Electrical Workers, the president or business representative of the local union appeared as union counsel.

The stage of the grievance-arbitration procedure at which counsel was called in to advise on or handle the proceedings, and the particular classification or sub-classification of grievances, are set out below:

	Lawyer	International Representative or Official	Officer or Representative of Local Union
Before grievance filed	3: 1- job classification 1- discharge 1- sick pay stopped upon allegation of malingering	4: 2- discharge 1- suspension 1- management rights (foreman performs work ordinarily performed by those in the bargaining unit)	0
As soon as grievance filed	0	0	0
During grievance steps	3: 1- discharge 1- suspension 1- management rights	2: 1- determination of employer contribution to pension plan 1- management rights (change of working hours abolishes paid lunch-time)	0
After final grievance step but before union call for arbitration	0	2: 1- determining date from which back pay should be calculated after job reclassification 1- management rights (change of working hours abolished paid lunch-time)	0
After call for arbitration but before choice of union nominee	0	1- suspension	0

	Lawyer	International Representative or Official	Officer or Representative of Local Union
After union nominee chosen	2 - discharge	0	0
After whole board constituted	1 - discharge	2: 1 - discharge 1 - suspension	1 - discharge
[No Response]		4	2

Almost all the legal counsel for the party unions agreed that ideally they should be consulted before the grievance is filed in order that they might assure that the grievance document is properly worded and the appropriate remedies have been requested. One legal counsel stressed the importance of the parties themselves trying to settle the grievance as a reason for advocating first consultation with him some time after the grievance has been filed.

Almost all the international union representatives and officials who acted as counsel agreed that the local unions should consult them as early as possible concerning the grievance so that they may advise on or control all local union action thereon. Indeed, two international union representatives were always consulted before the grievance was filed because their jobs included handling local union grievances. Only one international representative wanted first to be consulted at a later stage, viz., when the local union could clearly see that the grievance would not be settled.

PART SIX: DEFINITION BY THE PARTIES FOR THE ARBITRATORS OF ISSUES TO BE DETERMINED

1. BEFORE THE HEARING CONVENED

The amount of information varied which the respective nominees and the chairman (or sole arbitrator) had received about the issues before the hearing convened. More chairmen than nominees knew nothing at all about the issues. While more employer nominees than union nominees had some advance information (varying from general to detailed), more union

nominees than employer nominees had been informed in advance by the party union or counsel of the nature of the grievance or of the positions thereon of one or both parties. The breakdown of relative information and source follows:

	No idea at all	Advised by respective nominator(s) or counsel of general class of grievance only	Advised by respective nominator(s) or counsel of general class of grievance and of position thereon of party (or parties)
Chairman or Sole Arbitrator (24 hearings)	15	9	0
Employer nominee (22 hearings)	1	15	6
Union nominee (22 hearings)	5	8	9

The chairman and sole arbitrators expressed widely varying opinions regarding the advisability of issue-definition before the hearing convenes. Their opinions varied from that of two who thought that such issue-definition was "neither necessary nor appropriate" to one who thought that in arbitrations sharp definition of issues was more necessary than in court litigation. Other opinions expressed were: such issue-definition might save time but would be inappropriate because of increased expense, increased formality, and prejudice to the parties arising from their uniformed admissions; of some advantage though not necessary; utopian since too difficult to implement. Three arbitrators supported their opinion that such advance issue-definition was not necessary by their observation that the issues always (or at least, usually) emerge to the arbitrator's understanding as the hearing progresses.

2. AT THE HEARING

At 9 of the 24 hearings, employer counsel and/or union counsel simply filed with the arbitrators at the opening of the hearing the grievance documents and the employer's replies. At 12 other hearings, in addition to filing these documents at the opening of the hearing, employer and/or union counsel orally outlined their respective versions of the issues in their opening addresses. At none of the hearings was any written statement of issues submitted to the arbitrators jointly or by either party. At three of the hearings, the parties made

no attempt at all--either by filing grievance documents, or by oral addresses, or otherwise--to define the issues for the arbitrators before the hearing proper proceeded.

Five of the nine men who acted as chairman (or sole arbitrator) stated that they were satisfied with the present methods of issue-definition at the hearing. Two of the nine would like to receive from the parties at the opening of the hearing one agreed written statement of the issues. Several expressed views that one or other of the following would be useful to him as arbitrator: a written statement of alleged issues from each party at the opening of the hearing; a written statement of alleged facts from each party at the opening of the hearing; a pre-hearing conference with the parties, with or without the nominees, to narrow the issues.

PART SEVEN: PROCEDURE AT THE HEARING

1. SWEARING OF WITNESSES

In nineteen of the arbitrations observed, witnesses were formally called to give oral testimony. In two others, oral testimony was given informally by persons sitting at the counsel table. At seventeen out of the 19, the witnesses were sworn--at 15, pursuant to the chairman's compulsory directions; and at 2, at the parties' request pursuant to the chairman's direction that swearing was optional with the parties.

Witnesses were sworn in 7 out of the 8 hearings of discharge grievances where the merits were tried, as well as in one hearing of a discharge grievance where testimony was

heard solely on the employer's preliminary objection concerning untimeliness of the grievance. Witnesses were sworn in the three hearings of suspension cases which proceeded to the point where witnesses were called. Witnesses were also sworn in the three management rights' cases where witnesses were formally called (qualification added to job requirements, sick-pay stopped, change of working hours abolishes paid lunch-time), as well as in the cases involving determination of the date from which to calculate back-pay, and sick-pay stopped on the allegation of malingering.

The following chart relates the qualifications of the chairmen (or sole arbitrators) to the numbers of cases in which they sat, and in which they swore witnesses.

	Number of cases where oral testimony presented (formally or informally)	Number of cases where witnesses sworn	Number of cases where swearing made optional
Alternate and vice-chairmen, Labour Relations Board	6	4	0
Professional labour arbitrator (retired magistrate)	6	5	0
Law school teachers of labour law	4	2	2
Lawyer-magistrate	2	2	0
Crown Attorney	2	2	0
Professional industrial relations counsellor	1	1	0
Retired deputy Minister of Labour	1	1	0

2. EXCLUSION OF WITNESSES

In one managements rights' case (foreman performing work ordinarily performed by those in the bargaining unit), and in the hearing of an employer's preliminary objection in an unjust dismissal case that untimeliness of the grievance deprived the board of jurisdiction, the chairman ordered that all prospective witnesses should wait outside the hearing-room until they were formally called to testify.

In five of the eight hearings of the merits of a dismissal grievance and in one of the four hearings of a discipline grievance, the chairman ordered that all prospective witnesses, except the grievors, should be excluded until they testified. In one other dismissal case, the chairman refused the employer's request for an order of exclusion because the only witnesses for the union were the grievors. In two other dismissal cases and two other discipline cases, no order was requested nor made.

Other than the cases referred to above, no orders to exclude witnesses were made at any of the hearings.

3. ORDER OF INTRODUCTION OF EVIDENCE

At 20 hearings, evidence was led on substantive issues. At two other hearings, evidence was led solely on the issue of the preliminary objection by the employer directed to the arbitrators' jurisdiction. In the latter two instances, the employer led evidence first. Of the former 20 hearings, the employer led evidence first in six cases (four dismissal, one suspension, and one determination of date from which back pay should be calculated), and the union led evidence first in the

other 14 cases.

4.V. INTRODUCTION AND ADMISSION OF HEARSAY EVIDENCE

At 10 of the 22 hearings where evidence was led, no hearsay was offered in evidence. At the other 12, some hearsay was offered in evidence. The scope of admission of the hearsay as related to the particular grievance classification, and the qualification of the chairman (or sole arbitrator) are set out below:

	Hearsay admitted on all facts	Hearsay admitted on all facts except crucial fact issues	Refusal to admit any hearsay
Alternate or vice-chairmen, Labour Relations Board	1- dismissal	2- dismissal	
Professional arbitrator		1- dismissal	1- dismissal
Law school teacher of labour law		1- suspension	
Lawyer-magistrate	1-dismissal	1- sick pay stopped on allegation of malingering	
Crown Attorney			1- determining date from which back pay should be calculated
Professional industrial relations consultant			1- dismissal 1-management rights (foreman performs work ordinarily performed by those in the bargaining unit)
Retired deputy Minister of Labour	1- suspension		

5 K. NATURE OF EXAMINATION OF WITNESSES FORMALLY CALLED

Witnesses were formally called to testify at 19 hearings. In all of the 19, while the atmosphere of examination was more informal than in a court trial, court rules of examination were generally followed (viz., examination-in-chief with no leading questions on the issues, followed by cross-examination containing leading questions, followed by re-examination to clarify ambiguities raised on cross-examination and to rehabilitate the witness). In addition, as occurs in some court trials, on re-examination counsel sometimes asked questions tending to raise issues not explored on cross-examination. In that event, the arbitrators permitted opposing counsel to re-cross-examine the witness on those particular issues alone.

In ten of these 19 hearings, a lawyer was acting as counsel for one or both parties. In eight of these 19 hearings, a lawyer acted as counsel to the employer; in seven, a lawyer acted as counsel to the union. In only two of the 19 hearings did the chairman of his own motion intervene frequently to enforce the examination rules. In one of these two hearings, the chairman of the arbitration board was a chairman of the Ontario Labour Relations Board, and in the other, he was a professional industrial relations consultant. In both of these hearings, neither counsel to the parties was a lawyer.

6 K. PARTICIPATION OF MEMBERS OF THE ARBITRATION BOARD OR THE SOLE ARBITRATOR IN WITNESS EXAMINATION

In 18 of the 24 hearings, a tripartite board heard oral testimony from witnesses who were formally called by

a party. In one other hearing, a sole arbitrator heard such oral testimony.

The following chart sets out the extent and quality of witness examination by the respective arbitrators, and their objective appearance of partiality-impartiality during this examination. In the greater number of hearings, the respective nominees either asked the witnesses no questions or limited their questions to clarification of previous testimony. In a much small number of hearings, the respective nominees took a more active, partisan role in questioning with union nominees slightly exceeding employer nominees. The general manifestation of partiality-impartiality by the respective nominees in their witness questioning exactly parallels the respective degrees and kind of witness questioning by nominees.

Chairmen (or sole arbitrators) tended more than nominees to intervene in witness questioning in order to clarify testimony, and to intervene less in order to go beyond clarification. All chairmen and sole arbitrators manifested patent impartiality.

	Number of hearings, no questions asked	Number of hearings, non-partisan questions limited to clarification	Number of hearings, some questioning beyond clarification (partisan where nominees)	Number of hearings, much questioning beyond clarification (partisan where nominees)	Number of hearings, appearance of patent impartiality	Number of hearings, appearance of patent partiality
Chairman (or sole arbitrator) 19 hearings	1	14	3	1	19	0
Employer nominee 18 hearings	4	10	2	2	15	3
Union nominee 18 hearings	4	10	1	3	14	4

18. ADVISING ARBITRATORS OF REQUISITE BACKGROUND TO THE ISSUES

Of the 22 hearings where evidence was adduced, in six oral testimony alone was called to advise the arbitrators regarding the requisite factual industry background; in four, counsel's oral statement alone supplied this factual background; and in 12 the combination of oral testimony and counsel's statements did so.

8~~7~~. ORDERS FOR PRODUCTION OF DOCUMENTS; VIEWS

Under The Labour Relations Act (Ontario), the arbitrators have the power to order production of documents, and personally to inspect or view any place or article relevant to the issues. In no hearing observed did the arbitrators order production of any document nor order a view.

9~~8~~. FORMALITY OF THE HEARING

The investigators observing the hearings attempted to compare various elements of the hearings to analogous elements of court trials in order to gage comparative degress of "formality". These elements were relative adherence to court room etiquette (e.g., counsel as sole spokesman for the party; counsel and parties awaiting their turn to speak; due deference to the adjudicators), and adherence to court methods of witness examination. Out of the 19 hearings which proceeded beyond preliminary stages, 5 were conducted with formality akin to that of a court trial; 13 were conducted with a fair degree of formality; and one was conducted with little formality.

PART EIGHT: HOW AND WHY THE MEMBERS OF THE BOARD OR THE SOLE ARBITRATOR HAD BEEN CHOSEN

In all 22 hearings where a tripartite board sat, representatives of the party employers and party unions, as well as their counsel (if any), were asked to state how and why their particular nominee and this particular chairman had been chosen and any difficulties experienced in selecting either. In the two hearings where a sole arbitrator sat, the questions were limited to reasons for their choice of this particular arbitrator and their difficulties in selecting him.

Since the answers to the questions concerning reasons for choice vary widely in rationale and language, any attempt beyond rough classification is not warranted. Therefore, except for an introductory statement regarding tendency of the replies, there will simply be listed thereafter, in descending order of frequency, the verbal substance of the comments followed in brackets by the frequency of this response even where a particular respondent also made one or more other listed responses.

1. EMPLOYER NOMINEE

(a) Employer's choice

Employers choose nominees based on their knowledge of the particular man's connection with, knowledge of, and leaning to management viewpoint in labour relations matters, and their previous favourable experience with the man as employer nominee on arbitration boards. Employers experienced

almost no trouble in obtaining suitable nominees.

(i) "We had used this man to our satisfaction on several previous occasions." (6)

(ii) "We left the choice to our counsel." (6)

(iii) "We chose a man who is experienced and partial to the management point of view." (3)

(iv) "We retain an industrial relations firm (or are members of an industrial relations institute), and they supply nominees for us." (2)

(v) "We chose our own industrial relations consultant with whom we could discuss the case beforehand." (2)

(vi) "We chose our own industrial relations consultant." (2)

(vii) "We chose a lawyer from the law firm that acts as our company's solicitors." (1)

(b) Counsel's choice

Both lawyers and industrial relations consultants choose employer nominees on the basis of their knowledge of the particular man's connection with, knowledge of, and leaning to management viewpoint in labour relations, and their (and the employer's) previous favourable experience with the man as employer nominee. Counsel experience almost no difficulty in obtaining suitable nominees.

(i) "The particular nominee is widely experienced in labour relations and arbitrations from the management viewpoint, and the employer has nominated him several times before." (2)

(ii) "The particular nominee is widely experienced in labour relations and arbitrations from the management point of view." (2)

(iii) "We had used this particular man to our satisfaction on several previous occasions." (2)

(iv) "This particular nominee is familiar with how this particular industry operates and what are its problems." (2)

(v) "The nominee is a member of an industrial relations firm which the employer has used in the past." (1)

(vi) "We usually choose lawyers as the employer's nominee because of their ability to assess credibility of witnesses and to determine questions of law, and we usually choose members of this one particular law firm because of their ability and expertise in labour relations." (1)

(vii) "We chose a lawyer here since we intended to raise technical, legal arguments." (1)

2. UNION NOMINEE

(a) Union's choice

Unions (like employers in the converse situation) choose union nominees on the basis of their knowledge of the particular man's connection with, knowledge of, and leaning to the union viewpoint in labour relations, and their previous favourable experience with the man as a union nominee. (Indeed, locals of the United Steelworkers of America assure these qualities in their nominees by always choosing a paid international representative or official of the United Steelworkers of America who has labour arbitration experience). Unions have no

trouble at all in obtaining suitable union nominees.

(i) "We always nominate a paid representative from our own international union who is experienced in labour relations." (7)

(ii) "We choose an experienced man with partiality to the union viewpoint." (5)

(iii) "We have chosen this particular man as our nominee for a considerable length of time because of his excellent performance and his excellent background in labour relations from a union viewpoint." (4)

(iv) "We are members of the Ontario Federation of Labour and they supply nominees for us." (1)

(v) "We usually nominate a union representative from another international union." (1)

(vi) "We always choose a man from our own geographic area so, if we lose, he can explain why to our members." (1)

(vii) "We nominate a lawyer only when technical, legal points are involved, because of the expense factor." (1)

(b) Counsel's choice

Unlike independent counsel to party employers, most of the independent counsel to the party unions (all of whom were lawyers) were not consulted by the union before the union chose a nominee. In the one case where the counsel had chosen a nominee, he chose "a representative of another international union with experience with whom I am quite familiar."

3. CHAIRMAN OR SOLE ARBITRATOR

(a) Who chose him

The chairman of 10 of the 22 tripartite boards had been chosen upon agreement of the two nominees; the chairman of four had been chosen upon the agreement of the employer and the union; the chairman of one had been chosen upon the agreement of the parties' respective legal counsel; and the chairman of four had been appointed by the relevant Minister of Labour when parties or their counsel were unable to agree. (In the case of two boards, the source of choice or appointment was not clear.)

The sole arbitrator who sat in two hearings was appointed in both cases by the Minister of Labour when the parties or their counsel were unable to agree.

(b) Difficulties of selection and suggested solution: Employers

All employers' representatives who expressed an opinion concerning the amount of difficulty which they experienced in obtaining suitable chairmen (or sole arbitrators) agreed that they experienced considerable difficulty. Several ascribed this difficulty to the present lack of enough qualified men who understand industrial relations, and to the busy schedule of the few qualified men. As a solution, the majority expressed their desire that county court judges again sit as chairmen. Two other suggestions were (i) a government-sponsored training course for arbitrators, and (ii) a rotating panel of chairmen nominated by unions and management, but appointed to boards by the Minister of Labour.

(c) Difficulties of selection and suggested solution: Employers' independent counsel

Most of the employers' independent counsel agreed that they experienced considerable difficulty in obtaining suitable chairmen (or sole arbitrators), and they assigned the same reason: too few qualified knowledgeable men, and the busy schedule of the existing, qualified men. As a proposed solution, all expressed the desire that county court judges again sit as chairmen. Several expressed opinions against the use of university professors ("they tend to disregard evidence or to compromise"; "they are too ivory-tower and inexperienced"), and against a rotating mandatory panel of chairmen. Others recommended (i) a government-sponsored training course for arbitrators; (ii) a travelling circuit of arbitrators under the Industrial Relations and Dispute Investigation Act (Canada); (iii) payment by the parties to the government which in turn would pay the arbitrators.

(d) Difficulties of selection and suggested solution: Unions

Most of the party unions agreed that they experienced considerable difficulty in obtaining suitable chairmen (or sole arbitrators) and assigned the same reason: too few qualified, knowledgeable men with too much work. A majority of those expressing an opinion about the engagement of county court judges were against it. Suggested solutions with the most support were (i) government-sponsored training courses for arbitrators; and (ii) creation of a panel of qualified arbitrators from which a choice could be made. Unlike employer counsel,

some unions expressed liking for law professors and found them "easy to get", i.e., readily available.

(e) Difficulties of selection and suggested solution: Unions' legal counsel

All legal counsel except one agreed that they experienced considerable difficulty in obtaining suitable chairmen (or sole arbitrators) and they assigned the same reasons as above. Several added supplementary reasons: employers do not want academics as arbitrators, and employers tend to propose persons who are too technical and view matters in terms of strict contract law. There were only a few opinions concerning solution: one suggested re-engagement of county court judges (while another rejected this); another suggested that there should be a panel of qualified arbitrators from which a choice could be made; a third suggested that the government pay the chairman and the parties pay the government.

PART NINE: PROPER ROLE OF NOMINEES ON BOARD OF ARBITRATION

All the nominees, all the parties, and all the independent counsel (legal and non-legal) were asked to define what they conceived to be the appropriate function of their side's nominee. The chairmen (and sole arbitrators) were asked to define what they conceived to be the appropriate function and conduct of the nominees; they were also asked to set out what their experience had shown to be the useful functions of nominees, and the purpose for which nominees are useless or detrimental to the arbitration process.

The responses concerning appropriate function received from the separate catagories of persons were classified into several aspects of definition. The responses of specific persons who sat as nominees on more than one board, or of counsel who appeared at more than one hearing, were treated cumulatively as if they came from different persons. However, not all persons who were interviewed responded in a way permitting inclusion into all of the classes of definition-aspects.

1. DEFINITIONS OF APPROPRIATE FUNCTION AND CONDUCT OF NOMINEES

The following chart reflects the responses of:

(i) the 15 different men who sat as employer nominee, the 16 different men who sat as union nominee, the 21 different party employers, and the 22 different party unions--all in 22 different hearings by a tripartite board;

(ii) 13 different independent counsel (legal and non-legal) who appeared for the employer at 16 different hearings, and 8 different legal counsel who appeared for the union at 9 different hearings;

(iii) 9 different chairmen (and sole arbitrators) who sat in 24 different hearings.

The classes of definition-aspect and the numbers of responses falling within each follow. The responses of nominees, parties and counsel refer to the functions of nominees appointed <u>generally by that side</u> (i.e., by employers and by

unions); the responses of chairmen and sole arbitrators refer to the functions of nominees appointed generally by either side.

		Employer nominees (22 possible responses)	Union nominees (22 possible responses)	Employers (22 possible responses)	Unions (22 possible responses)	Employer Counsel (6 possible responses)	Union counsel (9 possible responses)	Chairmen (9 possible responses)
General Attitude and Conduct	(i) nominee ought to maintain a non-partisan and judicial attitude, and conduct himself accordingly, before, during and after hearing	3	2	3				
	(ii) nominee should be impartial and fair				2			
	(iii) nominee should be "quasi-judicial"						2	
	(iv) should be fair, given his frame of thinking in favour of the side which nominated him			3				
	(v) should be his side's representative, but impartial						1	
	(vi) as his side's representative, he should be firm and fair					1		
	(vii) to represent his side and to assist labour-management relations		2					
	(viii) not a quasi-judicial officer: may be biased in favour of the side which nominated him		1					

		Employer nominees (22 possible responses)	Union nominees (22 possible responses)	Employers (22 possible responses)	Unions (22 possible responses)	Employer Counsel (16 possible responses)	Union Counsel (9 possible responses)	Chairmen (9 possible responses)
Conduct Before Hearing	(i) before the hearing, may (or should) discuss case ex parte with nominator (or its counsel), and advise thereon	2	4	2	6	3		5
	(ii) before the hearing, may not discuss case ex parte with nominator (or its counsel) and advise thereon							4
Conduct During Hearing	(i) during the hearing, may (or should) discuss case ex parte with nominator (or its counsel)				1	1		1
	(ii) during the hearing, may <u>not</u> discuss case ex parte with nominator (or its counsel)							7
	(iii) during the hearing, should (or may) question witnesses with the purpose to adduce evidence favourable to the nominator			1	2	1	2	4 (1 more ambiguous)
	(iv) during the hearing, may <u>not</u> question witnesses with the purpose to adduce evidence favourable to the nominator						1	4 (1 more ambiguous)

		Employer nominees (22 possible responses)	Union nominees (22 possible responses)	Employers (22 possible responses)	Unions (22 possible responses)	Employer counsel (16 possible responses)	Union counsel (9 possible responses)	Chairmen (9 possible responses)
Conduct After Hearing	(i) after hearing, should argue for own view of correct interpretation of the contract					1		
	(ii) after hearing, should assure that other members understand nominator's case and argument	2						
	(iii) after hearing, should put forward to other members of board the strong points of nominator's case and the weak points of the opponent's case	17	6	19	14 (1 more ambiguous)	15 (1 more ambiguous)	5	8
	(iv) after hearing, should be advocate for nominator	3	8	7	7		2	
	(v) after hearing, should <u>not</u> be advocate for nominator	1	1					

		Employer nominees (22 possible responses)	Union nominees (22 possible responses)	Employers (22 possible responses)	Unions (22 possible responses)	Employer Counsel (16 possible responses)	Union counsel (9 possible responses)	Chairmen (9 possible responses)
Determining Issue	(i) should decide case solely according to the evidence and the merits	13 (1 more ambiguous)	6 (1 more ambiguous)	3 (1 more ambiguous)	6	9	2	6
	(ii) should decide case in order to help labour-management relations		1					
	(iii) should vote for nominator unless it was patently wrong	2 (1 more ambiguous)	9 (1 more ambiguous)	9 (1 more ambiguous)	4	1 ambiguous	1	
	(iv) may vote for nominator unless it was patently wrong							1
	(v) may vote in biased way							2
	(vi) should vote for nominator in all events		1		5	1 ambiguous		

In terms of an inquiry into the relevant importance of the various purposes of labour arbitration, some of the more significant aspects of this collation of responses are:

(i) Several employer nominees and union nominees, as well as several employers, believe that their side's nominee should hold a judicial attitude and should act judicially at all times. However, no chairman, no union, and no counsel (union or management) was of that view.

(ii) Five out of 9 chairmen, several employer nominees and union nominees, several employers and unions, and several employer counsel, hold that their side's nominee may (or should) discuss the case ex parte before the hearing with their nominator (or its counsel) and advise thereon. Four out of 9 chairmen denied that such prior discussion is proper.

(iii) One chairman, one union, and one employer counsel hold that a nominee may discuss the case ex parte during the course of the hearing with his nominator (or counsel); seven of the chairmen denied that this would be proper.

(iv) Four chairmen, and one or two each of employers, unions, and counsel to employers and to unions, hold that a nominee may (or should) question witnesses at the hearing with the purpose of adducing evidence favourable to the nominator; four chairmen deny that this is proper.

(v) Clearly, the function which has the most support is the nominee's task after the hearing of putting forward to the other board members the strong points of his nominator's case

and the weak points of the opponent's case. Almost all the chairmen, employers and employers' counsel, as well as a majority of employer nominees, unions and union counsel expressed this view. A smaller number of union nominees expressed this view, with more of them of the opinion that the union nominee should be an advocate for the union. This view was shared respecting their own nominees by about one-third of the employers and unions.

(vi) Many more employer nominees believed that their duty was to decide the case solely according to the merits than believed that they ought to vote for the employer unless the employer was patently wrong; the exact reverse was true of the employers themselves. On the other hand, more union nominees believed that they ought to vote for the union unless it was patently wrong than believed that they ought to decide the case solely according to the merits; the exact reverse was true of the unions themselves. While two opinions of chairmen held that the nominee may vote "in a biased way" and one permitted the nominee to vote for the nominator unless it was patently wrong, most opinions favoured the view that the nominee should decide the case solely according to the evidence and the merits. However, while no employer nominee, nor employer, nor union counsel asserted that the parties nominee should vote for the nominator in all events, five unions, one union nominee (and possibly one employer counsel) asserted just that.

2. UTILITY AND DETRIMENT OF NOMINEES TO THE PURPOSES OF LABOUR ARBITRATION: VIEWS OF CHAIRMEN AND SOLE ARBITRATORS

(a) Functions of the nominees useful to arbitration

The responses here fall easily into two main definitions of function, and several subsidiary functions. The two main general functions are:

(i) The nominees assist the chairman in the various aspects involved in the chairman's determination of the dispute and his formulation of reasons for decision. (11 responses to this effect.)

(ii) The nominees keep the parties content with arbitration as the method of settling disputes. (4 responses to this effect.)

Responses which fell within main definition (i) were:

(a) "The opinion of the nominee is sometimes helpful in formulating the chairman's decision." (3)

(b) "The nominees thoroughly review the evidence for the chairman."

(c) "They may be useful in 'fact-interpretation' by filling in the chairman on points not questioned on during the hearing."

(d) "They sometimes provide background ('legislative') facts."

(e) "Because of their familiarity with the collective agreement, they can assist by explaining it to the chairman."

(f) "They guide the chairman to the exact issue which the parties want resolved."

(g) "They provide both the legalistic and practical view of the problem."

(h) "They help the chairman avoid gross errors."

(i) "They help the chairman analyze his decision by pointing out the consequences."

Responses which fall within main definition (ii) were:

(a) "They keep the parties happy by allowing a full ventilation of the dispute."

(b) "The parties may be kept happy and the award may be made more palatable [presumably to the losing party] if the award is unanimous, or if there is a dissent."

Other useful functions mentioned were (in order of their arising in an arbitration):

(a) the nominee may act as substitute advocate for the nominator in advancing its case in the event that counsel for that side is incompetent.

(b) if mediation seems appropriate, the nominees can feel it out and handle the mediation.

(c) sometimes the independent reasons for the award written by a nominee clarify what the chairman meant in his reasons.

(b) Purposes for which nominees are useless

Few of the chairmen responded to this question, apparently because they found nominees useful for some purposes. Those who did respond referred to aspects of the arbitration process where the nominee's partisan leaning tends to inhibit his full participation in the ultimate decision which determines the dispute:

(i) useless in informing the chairman of the law.

(ii) useless to decide on the credibility of witnesses.

(iii) useless to decide on the facts as presented at the hearing.

(iv) useless in the process of decision generally.

(c) Ways in which nominees are detrimental to purposes of labour arbitration

The responses here fall easily into two main definitions and several subsidiary definitions. The two main definitions (the first encompassing many more responses than the second) are:

(i) Due to the nominee's self-identification with his nominator, the nominee conducts himself in many respects in order to affect the result in favour of his nominator and he thereby detrimentally affects the board's judicial function.

(ii) The nominees cause time delays at every stage of the arbitration process.

Responses which fall within definition (i) were:

(a) "Nominees tend to be too closely linked to their nominator."

(b) "Nominees act as advocates at the hearing by making useless objections."

(c) "Nominees act as advocates at the hearing by taking over counsel's job, thus destroying the board's judicial appearance."

(d) "Some nominees leak out tentative ideas for the result to their nominator."

(e) "Nominees never listen to the chairman's arguments."

(f) "Nominees attempt blackmail by threatening not to appoint the chairman again if the dispute determination is adverse to the respective nominators."

(g) "Their whole purpose is to influence the chairman without any objectivity."

Other responses were:

(a) Nominees increase unnecessarily the cost of hearings.

(b) Some nominees try to negotiate the result.

(c) Those nominees who are not lawyers ignore legal principles.

On the basis of the responses of chairmen and sole arbitrators here, I hazard the following generalization of

their opinions: the nominee's sense of representing his nominator is valuable and proper insofar as this sense prompts the nominee to put forward to the chairman all the evidential and legal possibilities favouring a decision for his nominator; however, where this sense pushes the nominee beyond such conduct, it may well result in harm to the nature of arbitration as a method of adjudicated settlement of labour disputes.

Of the nine chairmen or sole arbitrators, only one categorically stated that he would not want to sit as a sole arbitrator in a general regime of single-man tribunals. While only one other categorically stated that he preferred to sit as a sole arbitrator, three others strongly implied concurrence with this latter view.

PART TEN: FUNCTION OF THE BOARD (OR SOLE ARBITRATOR) AS MEDIATOR

All nominees, chairmen and sole arbitrators were asked whether attempts by the arbitrator or members of the board to mediate or suggest a negotiated compromise between the parties are ever appropriate.

1. VIEWS OF NOMINEES

Twenty-two responses were tabulated from each group of 15 different employer nominees and 16 different union nominees.

	Employer nominees	Union nominees
Never appropriate	8 (1 ambiguous)	5
Rarely appropriate	10	6
Sometimes appropriate	3	3
Generally appropriate	0	8

Of those responses which fell within the categories "Never appropriate" or "Rarely appropriate", the reasons offered most often in support of the denial related directly to the assumption that the task of labour arbitrators is adjudicative and not mediatory, viz., arbitrators must determine finally the issues in dispute by declaring the "right" and the "wrong" between the parties and by rendering a binding decision. Closely linked to this rationale were the subsidiary reasons offered in a small number of responses that, by the stage of arbitration, the parties have exhausted the possibilities of settlement through negotiation and that further negotiation at this stage would rarely succeed in achieving settlement. Also closely linked to this rationale was an employer nominee's response that the arbitrators' mediative efforts require hearing evidence and this will compromise any future adjudicated award. Again, one union nominee reasoned that such mediation efforts would weaken the ultimate possibility of arbitration as a union bargaining weapon during pre-arbitration grievance procedures and, by encouraging employers not to settle grievances at pre-arbitration stages, would result in growing employee unrest.

Of those responses which fell within the category "Rarely appropriate", the rare occasions where such attempts would be appropriate were variously defined as "where the parties requested mediation"; "if there is a terrific mixture of law and fact"; "if something comes up during the hearing that one side knows nothing about"; and, "only if the time of

the grievance and the time of the arbitration hearing are close together". Several employer nominee responses restrict the suggestion and efforts on the rare occasions to the nominees and exclude the chairman. Significantly, all of these responses appear to be directed to various considerations involved in the "adjudicative" theory of the arbitrators' prime task: where, for specific reasons, adjudication may not yield maximum benefits to the particular parties, and the chairman's patent impartiality is preserved, such efforts are justified. The response of one union nominee that such efforts should be restricted to the chairman is not in line with this rationale, but it may emphasize the moral suasion of the neutral chairman as a factor conducing to settlement.

Of those responses which fell within the category "Sometimes appropriate", the employee nominee responses stressed as preconditions assent by both sides and merit on both sides. Union nominee responses mentioned the necessity to keep the parties as happy as possible, as well as compromise as the best solution where the union has no real case.

While there were no employee nominee responses falling within the category "Generally appropriate", the largest number of union nominee responses (over 1/3 of the total) fell within this category. Here the underlying reasoning seemed to have two main branches: (i) resolution of the issues by agreement of the parties is preferable to determination of the issues imposed by outsiders; (ii) resolution of the issues in this way

is not per se a bad thing but is seldom tried because of restraints imposed by the chairman (who fears judicial intervention and who wants to make lots of money) or by the employers or by the unions. It will be noted that this reasoning ignores the countering objections to mediation efforts voiced by those whose responses fell in the other categories.

7-8. VIEWS OF THE CHAIRMEN OR SOLE ARBITRATORS

Responses were tabulated from each of the nine chairmen or sole arbitrators. Five them were of opinion that such efforts were "rarely appropriate"; four of them that they were "sometimes appropriate"; none of them that they were "never appropriate" or "generally appropriate".

Of the respondents who answered "rarely appropriate", two of them stressed that the possibilities for settlement through negotiation have been largely exhausted by the arbitration stage. Two of them stated that, at the arbitration stage, what the parties want is an adjudication on the contract and the facts. Two of them held that such efforts should only occur when the parties asked for them, and another added as an appropriate occasion the situation where the parties do not understand the process in which they are involved. Two added that the chairman or sole arbitrator should not participate in such efforts. All of these responses are directly related to the underlying assumption that what labour arbitration ought to be is settlement of the dispute by adjudication, and that this method of settlement at the arbitration stage should only be

compromised on the facts of a particular case where settlement by adjudication is not entirely appropriate.

The rationalia offered by those who answered "sometimes appropriate" were various: "if the parties ask for mediation by the board"; "where it is obvious that one side will lose"; "sometimes the board's appropriate role is obtain the parties' agreed settlement and not to impose a determination". Two limitations voiced here were: the chairman should not participate in the mediation efforts, and the award (even though a negotiated settlement) should be drafted in the form of an adjudicated determination. All of these responses are also directly related to the assumption that in general labour arbitration ought to be dispute adjudication; under certain circumstances, they compromise this method of determination in favour of consensual settlement, but they still insist upon the appearance of impartiality in the chairman and the appearance of adjudicated settlement.

PART ELEVEN: SOURCES OF RULES OF DECISION AND REMEDIAL RULES

1. EXTENT TO WHICH ARBITRATOR DEEMS HIMSELF BOUND TO THE WRITTEN WORDS OF THE COLLECTIVE AGREEMENT IN DETERMINING THE DISPUTE

(a) Nominees

Of the twenty responses from employer nominees, all asserted that they were very closely bound to the written words. Of the twenty-one responses from union nominees, eighteen asserted that they were very closely bound while the other three responses asserted a greater power to interpret the words

"broadly rather than literally" in favour of the union. These latter responses may indicate a slightly greater sense of freedom in union nominees than in employer nominees to find meaning in the terms of the collective agreement which goes beyond dictionary definitions and grammatical sense into the "intention" and "spirit" of the parties' agreement.

(b) Chairmen or sole arbitrators

The nine tabulated responses here indicate an even greater sense of freedom to find meaning beyond dictionary definitions and grammatical senses. The following table sets out the substance of the responses, and the number and qualifications of the respective respondents giving the particular responses:

Closely bound in all cases	1 - lawyer-magistrate
Closely bound, except in cases of language ambiguity, or lack of relevant contract language, or where parties' prior conduct had put special meaning on contract language	4: 1 - professional labour arbitrator 1 - industrial relations counsel 1 - Crown Attorney 1 - retired deputy Minister of Labour
Closely bound in certain kinds of cases (for example, policy grievances), but much wider scope in "just cause" discharge cases	1 - Alternate chairman, Ontario Labour Relations Board
Closely bound once "proper and true meaning" of the agreement is found	2: 1 - Law teacher 1 - Vice-chairman, Ontario Labour Relations Board
Closely bound if words of agreement clearly relate to the issue; otherwise the decision is directed by the spirit of the words as the arbitrator conceives it	1 - Law teacher

The responses here appear to correlate with the respective qualifications of the respondents. At the one extreme, the lawyer-magistrate holds himself closely bound in all cases to the written words of the collective agreement; at the other extreme, the law school teachers of labour law (and a vice-chairman of the Ontario Labcur Relations Board, who was once a law teacher) are more concerned with the "proper" meaning and the "spirit" of the words. Most of the remaining responses (all from non-academics) appear to lie closer to that of the lawyer-magistrate.

2. SOURCES OF RULES OF DECISION

The tabulation below of the responses sets out every response given by all persons interviewed. In the tabulation of the nominee responses, persons who served on more than one board are treated as if they were different persons; in the tabulation of the responses of chairman (or sole arbitrators), the responses are tabulated once only.

	Employer nominees [22 interviews]	Union nominees [22 interviews]	Chairmen (or sole arbitrator) [9 interviews]
Words of the collective agreement	12	9	1
Common law rules of contract law and interpretation	6	1	2
Precedents of other arbitration cases	20	20	6
Evidence at the hearing	11	9	4
The facts as established			1
Reasoning and/or logic	2	2	
Common sense	5	16	1
Experience	2	2	
Understanding of labour relations in Canada			1
Understanding of labour arbitration jurisprudence			1
Personal sense of what is "right"		2	
Argument of counsel	3	2	1
The Labour Relations Act			1

Precedent of other arbitration cases is clearly the favourite source of decisional rules for all arbitrators. In addition, several aspects of the tabulation are consistent with the responses concerning the extent to which the arbitrator is bound by the words of the collective agreement: (i) more responses of employer nominees than of union nominees point to the words of the collective agreement as a source of rules of decision, while only one response of a chairman does so; (ii) many more responses of union nominees than of employer nominees indicate "common sense" as a source, while one response of a chairman does so. Among chairmen and sole arbitrators, there appears to be no correlation between the responses and the qualifications of the individual respondents.

3. SOURCES OF REMEDIES

The tabulation below again sets out all responses given by all persons interviewed. The responses of persons who served as nominees on more than one board are treated as if they came from different persons; the responses of chairmen or sole arbitrators are recorded only once.

	Employer nominees [22 interviews]	Union nominees [22 interviews]	Chairmen [9 interviews]
Request made in the grievance	3	2	1
Terms of the collective agreement (among other places)	9	11	3
Solely in terms of the collective agreement	3		
Precedent of other arbitration awards	12	14	1
Remedies of contract law	2		
Remedial power as defined in Polymer			2
Common sense	8	18	2
Personal sense of justice and right, or of reasonableness	5	5	2
Labour experience	1	2	
One's own evaluation and judgment			2
Labour Relations Act		1	
The evidence or the facts	3	1	

For nominees (unlike chairmen), precedent of other arbitration awards is a favourite source of remedies. But, for union nominees (as contrasted with employer nominees), "common sense" is even more favoured. In addition, while many responses of all arbitrators looked to the terms of the collective agreement as one source of remedies, three responses of employer nominees (and none of union nominees and of chairmen) looked to the terms as the sole source. Again, among chairmen and sole arbitrators, there appears to be no correlation between the responses and the qualifications of the individual respondents.

4. VALUE TO ARBITRATORS OF THE PAST AWARDS OF OTHER ARBITRATORS IN OTHER CASES ON SIMILAR ISSUES

(a) Nominees

	Employer nominees (22 responses)	Union nominees (22 responses)
Should be followed under the rule of stare decisis	2	
Should be followed unless wrong	2	
Should be followed if the same contract and the same facts; otherwise, highly persuasive	3	
Should be followed if persuasive		1
Strong persuasive value	14	12
Helpful as a guide	1	5
Little value		4

Clearly, the majority response of all nominees is that past awards have strong persuasive value. However, from that point, the other responses of employer nominees tend toward a theory of stare decisis, while the other responses of union nominees tend toward a theory of unbound decision.

(b) Chairmen nor sole arbitrators

The responses here do not fall neatly into any gradation commencing with an adherence to stare decisis and ending with "free" decision-making. If any generalization can be made, the responses appear to emphasize the utility of past awards as a guide to the arbitrator's thinking and analysis of the present dispute, and the utility of consistent awards to guide the parties' future conduct.

Great value	2
High value regarding general principles (for example, estoppel) and definitions (for example, employee)	1
Very useful to provide consistent case-law to guide the parties	1
Great value if I greatly respect the arbitrator; no value if I do not	3
Very helpful to demonstrate majority views and to help present arbitrator make up his mind	1
Generally to be followed (except on procedural points), but not binding	1

PART TWELVE: PURPOSES OF LABOUR ARBITRATION WHICH THE CHAIRMAN OR SOLE ARBITRATOR ATTEMPTS TO FORWARD

Although the language varied, the most common purpose articulated by the chairman and sole arbitrators was the impetus to future industrial harmony between the parties by means of present final settlement of the instant dispute. Several mentioned only the industrial harmony aspect, while several others mentioned only the present settlement aspect. One adverted to the function of giving justice to the individual grievor. Several added that, as arbitrators, their task is to settle a rule to guide the future conduct of the parties, and one added that he sees his role as including the duty to provide rules to guide the future conduct of other employers and other unions.

PART THIRTEEN: SATISFACTION OF THE PARTIES WITH THE PARTICULAR HEARING AND WITH THE LABOUR ARBITRATION PROCESS

1. THE PARTICULAR HEARING

Twenty of the party employers to 23 different arbitrations stated that they were satisfied with the particular arbitration hearing in which they had been involved. The following objections were voiced about the other three hearings respectively: the particular hearing was conducted in an informal manner while the employer had prepared for a formal hearing; the chairman was really ducking the crucial issue in the case; the chairman was entertaining evidence from the union regarding an irrelevant matter.

Seventeen of the party unions to 23 different arbitrations stated that they were satisfied with the particular arbitration hearing. The following objections were voiced about the other six hearings:

(i) The board should not have entertained the employer's preliminary objection regarding jurisdiction (viz., grievance not filed within time limited provided in collective agreement), since this was a mere technicality that would defeat justice.

(ii) Unfair for the employer to raise a preliminary objection of non-arbitrability.

(iii) Arbitrator does not understand the nature of the dispute.

(iv) The hearing will not solve the real problem (viz., contracting-out and having union men do part of the work at the lower rate).

(v) One employer witness was evasive during union examination and the board permitted this more than a judge in court would have done.

(vi) Result bad (i.e., the union grievance was dismissed).

2. LABOUR ARBITRATION PROCESS

Of the party employers in twenty-three arbitrations, three of them had never before been involved in a labour arbitration and could express no informed, critical comment about this method of labour dispute settlement. Of the twenty party

employers who had some previous experience, ten stated that they were wholly satisfied with the existing method of labour dispute settlement by arbitration. Of the ten who voiced some dissatisfaction, the comments of five related to the present lack of sufficient numbers of qualified, knowledgeable, trained arbitrators; two of these suggested that arbitration should be trained in a special, formal course; one suggested the availability again of county court judges. The five others who voiced some dissatisfaction were variously of the opinion that the whole process takes too long; that too many chairmen lean in favour of unions in order to insure future union nomination; that many arbitrators mediate; and that the use of sole arbitrators deprives a hearing of the element of democracy present when a tripartite board is used.

Of the party unions in twenty-three arbitrations, only one indicated complete satisfaction with the existing method. However, on the whole, the dissatisfactions were not with the process of arbitration per se as a valuable method to settle disputes without recourse to strike, but rather with certain existing defects in the use of the process. The leading complaints (voiced by eight unions) were that (a) the whole process of settling any particular dispute by arbitration takes too long, and (b) the hearing procedure, the methods of contract analysis, and the rules of decision are too "legalistic". Closely following (and linked to the latter complaint) was the variously-articulated complaint that there are not enough experienced, trained, knowledgeable arbitrators, and that the responsibility

for this training and supply lies with the government. Other complaints were that chairmen compromise decisions to avoid displeasing either side in order to assure future reappointment; that compulsory appointment by the Minister is unwise; that the fees of chairmen are too high; and that all boards should remain seized of matters until the award is completely executed and in order to interpret the award if called upon.

PART FOURTEEN: CONCLUSIONS

Due to the limitations of sample, time and personnel, the results of this study cannot form the basis of any firm conclusions concerning the working of labour arbitrations in Ontario--let alone in Canada. At best, the results confirm the known need for a greater number of knowledgeable and competent persons to act as chairmen and sole arbitrators, and they stress that government might play a valuable role in satisfying this need. In addition, the results appear, in some respects, to confirm the "conventional wisdom" concerning labour arbitrations while, in other respect, they appear to impugn this wisdom. For example, it cannot surprise anyone with some experience in this field that the parties chose nominees to boards who were sympathetic to their respective labour relations viewpoint; however, it may seem extraordinary that some employers and some nominees assert that nominees should act judicially at all times.

The main value of this Study has been in the opportunity offered to the Project Director to work out methods

of investigating the institution of labour arbitration. The results of this Study using these methods demonstrate that much more investigation of this kind, conducted in a wider geographic area and for a longer period of time, would yield valuable data.